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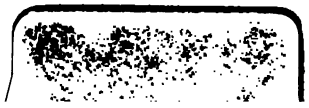

CASES ARGUED AND ADJUDGED

IN THE

Supreme Court of Florida,

DURING THE YEARS 1878-9.

REPORTED BY

GEORGE P. RANEY,

ATTORNEY-GENERAL.

VOLUME XVII—PART I.

TALLAHASSEE, FLA.

PRINTED AT THE FLORIDIAN BOOK AND JOB OFFICE.

1879.

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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. EDWIN M. RANDALL, Chief Justice.
HON. JAMES D. WESTCOTT, JR.,
HON. R. B. VAN VALKENBURGH, Associate Justices.

ATTORNEY-GENERAL.

GEORGE P. RANEY.

CLERK SUPREME COURT.

CHARLES H. FOSTER.

JUDGES OF THE CIRCUIT COURTS.

FIRST CIRCUIT—	HON. AUGUSTUS E. MAXWELL.*
SECOND CIRCUIT—	HON. P. WOODSON WHITE. † HON. DAVID S. WALKER.‖
THIRD CIRCUIT—	HON. WILLIAM BRYSON. ¶ HON. ENOCH J. VANN.§
FOURTH CIRCUIT—	HON. ROBERT B. ARCHIBALD.
FIFTH CIRCUIT—	HON. JAMES B. DAWKINS.
SIXTH CIRCUIT—	HON. H. L. MITCHELL.
SEVENTH CIRCUIT—	HON. WM. ARCHER COCKE.

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* *Ad interim* appointment expired and appointed for full term February 6, 1879. † *Ad interim* term expired. ‖ Appointed February 1, 1879. ¶ Term expired. § Appointed January 17, 1879.

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Decisions

OF THE

Supreme Court of Florida,

AT A

SPECIAL TERM

CONVENED NOVEMBER 16, A. D. 1878.

STATE OF FLORIDA EX REL. H. BISBEE, JR., VS. THE BOARD OF COUNTY CANVASSERS OF ALACHUA COUNTY.

1. It is not a valid objection to the jurisdiction of State courts in mandamus proceedings, relating to the canvass of election returns, that the office affected is that of Representative in Congress.

2. A return by election inspectors, in which the votes cast for a person are given twice or repeated, constitutes no ground for refusing to include such return in the statement or certificate by the county canvassers, it being on its face a mere verbal repetition, and not an attempt to misstate the votes cast. The fact that the statement sent to the Clerk contained such repetition, while that sent to the County Judge did not contain it, does not create such a variance between them as to authorize their rejection.

3. When the jurat to the oath of inspectors of election is not signed, or when the inspectors have not been sworn, but have acted as such and made proper returns, their acts are valid and their return of election should be counted.

4. A statement in the caption of inspectors' returns forwarded to the Judge that the election was held under an act of 1868 and the amendments thereto, (without giving the dates of the amendments,) while that sent to the Clerk gave the date of the act and

also the amendments, does not render the returns indefinite, uncertain, constradictory, or, in any sense, repugnant to each other, but they are regular and conformable to law. The difference is immaterial.

5. County canvassers cannot look beyond the inspectors' returns except to determine their genuineness as being signed by inspectors appointed or elected as such of the precinct. Ballots found in a ballot-box cannot be considered by the county canvassers.

6. Where the County Judge and Clerk have called in a Justice of the Peace, who acts with them in canvassing election returns, the Justice becomes a member of the board of county canvassers, and is, like the other members, amenable to the writ of mandamus to control or correct their action.

7. A certificate showing in general terms a performance of the several specific acts commanded to be done by a peremptory mandamus is the proper response to such a writ.

The relator, on the 16th day of November, A. D. 1878, filed a petition stating that on the 5th day of that month a general election was held in the several counties of the State for Representatives to the Forty-Sixth Congress of the United States, and at such election he was one of the candidates for Representative from the Second Congressional District, and that Noble A. Hull was the only other candidate therefor, and they were the only candidates voted for for such representative at such election. It further states that J. A. Carlisle, Clerk of the Circuit Court, J. C. Gardner, County Judge, and E. A. Castellaw, a Justice of the Peace of Alachua county, organized on the 11th day of November as the Board of County Canvassers to canvass the precinct returns; that among the voting precincts or districts in the county were three, known respectively as "Arredondo," "Dudley's Store" and "Gainesville" precincts or districts; that good and intelligible returns of the result of the election in these districts or precincts had been duly made by the inspectors and delivered to the Clerk and County Judge as required by law, and that they were opened and read by said Board of County Canvassers on

the 11th day of November aforesaid. It further states that it distinctly and clearly appears from the "Arredondo returns" that the relator, H. Bisbee, Jr., received at that precinct 225 votes, and Noble A. Hull received 66 votes, and from "Dudley's Store returns" that relator received at that precinct 278 votes, and Noble A. Hull 57 votes, and from the "Gainesville returns" that the relator received 324 votes, and Noble A. Hull 234, but that said Board of County Canvassers had refused and omitted to canvass said returns from these election districts and to include the votes specified therein in their certificate of the result of the election in said county. The petition also alleges that these returns were respectively duly signed by the inspectors of said precincts, and that the number of votes each candidate received is clearly and distinctly set forth without any uncertainty, but admits that in one of the duplicate returns from the Arredondo precinct the words "J. J. Arnow received three hundred and fifty-eight votes" are repeated, (Arnow was a candidate for member of the Assembly,) and says that this was the only objection raised to the returns by any member of the Board or other person. The petition further alleges that by excluding the votes aforesaid from the total vote cast and returned in the said Congressional District for such candidates for Representative in Congress, Noble A. Hull would have a majority, whereas by including and counting the same, the relator would have a majority, and be elected as such Representative. The petition prayed that the alternative writ should issue, and, in accordance with the prayer thereof, the writ issued, reciting the facts stated in the petition, and commanding the said J. C. Gardner, County Judge, J. A. Carlisle, Clerk of the Circuit Court, and E. A. Castellaw, Justice of the Peace, to convene and reassemble as the Board of County Canvassers of Alachua county and to count and canvass all the re-

turns on file in the office of such Judge and Clerk respectively, or which had been delivered to such Judge or Clerk respectively pursuant to law, of the said election, held on the fifth day of November, A. D. 1878, and as such County Canvassing Board to publicly canvass and count the election returns from each and every election district or precinct in the county of Alachua, wherein an election was held for the said office, and especially to count and canvass the election returns from the precincts or districts known in said county as Arredondo, Dudley's Store and Gainesville precincts or districts, and to canvass and count solely and entirely from the election returns of the precinct inspectors from all of the election districts or precincts in said county, as filed by such inspectors with the County Judge and Clerk of the Circuit Court respectively, and in no case to change or vary in any manner the number of votes cast for the candidates respectively at any of the polling places or precincts in the said county, as shown by the returns of the inspectors of such polling places, filed or delivered by them to such Judge and Clerk, and to forthwith compile the result of the election as shown by said inspectors' returns, and make and sign duplicate certificates, containing in words and figures written at full length, the whole number of votes given for such office, the names of the persons for whom such votes were given for such office, and to forthwith transmit by mail one of such duplicate certificates to the Secretary of State and the other to the Governor of the State of Florida, or to show cause why they have not done so before the Supreme Court, at the Capitol, in Tallahassee, at 10 o'clock, A. M., on the 20th day of November, A. D. 1878.

The 20th day of November the County Judge and Clerk of the Circuit Court filed an answer to the alternative writ. The defenses set up in it are stated in the opinion of the [redacted]ourt.

To this answer the relator demurred as being insufficient in law.

The Justice of the Peace did not appear or plead to the alternative writ, nor was it served on him; but he was served with a copy of the petition on November 14, and notified in writing at the same time that application would be made to the court for the writ to issue on the 16th of November.

As to the question of the repetition in the "Arredondo return" sent to the Clerk, which repetition does not appear in that sent to the County Judge, the statute requires duplicate returns to be made out by the inspectors, and one sent to the Clerk of the Circuit Court and the other to the County Judge. Chap. 3021, sec. 8.

As to the question of the absence of the jurat from the inspectors' oaths in the "Dudley Store precinct" returns, the statute provides that the inspectors shall, previous to receiving any votes, take and subscribe an oath or affirmation in writing, that they will perform the duties of inspector of election according to law, and will endeavor to prevent all fraud, deceit or abuse in conducting the same, and that the oaths of the inspectors shall be returned with the poll lists and returns of election to the Clerk of the Circuit Court to be filed in his office. Sec. 11, chap. 1625, and sec. 8, chap. 3021.

As to the point stated in the opinion of the court as having been suggested by counsel, that the County Judge and the Clerk being the only officers expressly designated to be mmbers of the Board, and that a Justice of the Peace must be called by them to be the third member, and that therefore the writ cannot go against the justice, as no individual justice is designated by the law, the statute (Sec. 9, chap. 3021,) provides that "on the sixth day after any election, or sooner, if the returns shall have been received, it shall be the duty of the County Judge and Clerk of the

Circuit Court to meet at the office of said Clerk, and to take to their assistance a Justice of the Peace of the county; and in case of the absence, sickness or refusal to act, or other disability of the County Judge or Clerk, the Sheriff shall act in his place, who shall constitute the County Canvassing Board."

H. Bisbee, Jr., in pro. per.

James M. Baker for Respondents.

THE CHIEF JUSTICE delivered the opinion of the court..

The respondents, Gardner, County Judge, and Carlisle, Clerk of the Circuit Court, make answer to the writ.

And first, they protest that this court has no jurisdiction to award this writ in this case, because the particular office for which the relator seeks to compel the canvass of returns is that of Representative in Congress.

It is not pretended by the relator that the canvassing of the votes determines his right to this office. That must be determined by the House of Representatives. But the relator says that the law of the State, under which the election was held, entitles him, if he shall appear to have a majority of the votes according to the election returns, to a certificate of that fact, and also that as a citizen of the State he has an interest entitling him to demand that the officers of election shall obey the law, which he alleges has been broken.

If he is entitled to a certificate of election from the officers of the State, according to the laws of the State, the courts of the State have power to aid him in procuring that certificate, and if proper returns of the election are withheld so that he is thereby deprived of this *prima facie* right, he may rightfully demand the aid of the courts to enforce this right. This power of the State courts was suc-

cessfully invoked in the cases of The State vs. Garesche *et al.*, (65 Mo., 480,) and The State *ex rel.* McDill, (36 Wis., 498.) See also 53 N. H., 473.

The relator does not claim any right by virtue of this proceeding, arising under the Constitution or Laws of the Uinted States, but only under the laws of the State, which provide the manner of conducting the election. These laws must be enforced by the tribunals of the State. We cannot conceive that there is any doubt of the jurisdiction of the State courts to enforce them, on the ground that the office affected by the proceeding is that of a representative of the people of the State in the National Congress.

The respondents say that they refused to canvass and include in the statement of the result of the election (which the law requires to be made and transmitted to the Governor and Secretary of State,) the returns of the inspectors in the Arredondo precinct, because the return forwarded by the inspectors to the Clerk contained a repetition of the statement, that for member of the Assembly G. J. Arnow received two hundred and fifty-eight votes; in other words, the number of votes for G. J. Arnow was written twice in that statement, and that the return transmitted to the County Judge contained the same statement of the votes for G. J. Arnow for member of the Assembly but once, or without the repetition, and therefore the two returns did not agree, and did not clearly set forth the number of votes for G. J. Arnow for member of Assembly.

We cannot discover that there is any difficulty in ascertaining from the returns, (the originals of which are presented for the inspection of the court,) the number of votes cast for G. J. Arnow by reason of the evidently clerical blunder. The other return did not contain the blunder, and it was thus manifest that it was a mere verbal repetition of words, neither increasing nor diminishing the ag-

gregate vote, but plainly apparent and producing no confusion whatever. The reason alleged is not a valid excuse for refusing to include the votes stated in the return in the aggregate canvass.

As a reason for omitting to include the votes cast at the Dudley Store precinct, the respondents say that the inspectors returned to the Clerk the form of the oath provided for them, signed by them, but the jurat was not signed by an officer, and therefore there was no evidence that the members of the Board were sworn as provided by law. The return is otherwise regular. The inspectors are public agents authorized to conduct the election and to certify the result. Like other official persons, having acted in a public official capacity, they occupy the position of officers *de facto,* even though they failed to return the oath duly taken.

It is entirely settled that the acts of *de facto* officials are valid as to the effect upon the public, though they may not be able to protect themselves in reference to their action. In The People vs. Cook, (14 Barb., 259, and 4 Selden, S. C., 67,) and State of Iowa *ex rel.* Rice vs. County Judge of Marshall, (7 Iowa, 186, 200,) it is held that the omission of inspectors of election to take the oath prescribed by statute will not invalidate an election held by them. In the case cited in 7 Iowa, the court remarks that the rejection of the returns from three townships, because they did not show that the officers were sworn, was not within the province of the county canvassers, and was an error. Even the court did not determine upon the sufficiency of the returns, it only decided that it was the duty of the canvassers to count them, leaving the question of law to a competent tribunal, when the case should be properly presented. See also 29 Ill., 413. A board of county canvassers is not authorized by any law thus to decide upon the official title of

the inspectors of election. This reason for the rejection of the Dudley's Store returns is also invalid.

As to the returns of the election held at the Gainesville precinct, the respondents answer that they refused to canvass and include said returns because the respective returns of said precinct received by the County Judge and the Clerk were not duplicates, in that one of them was a "return of an election held under an act to provide for the registration of electors and the holding of elections, approved August 6, 1868, and the acts amendatory thereof," and that the other was a return of an election held under "an act to provide for the registration of electors and the holding of elections, approved August 6, 1868, and the acts amendatory thereto approved February 7, 1872, and February 27, 1877," from which the respondents say they decided "that no election had been held at Gainsville precinct under the existing laws of the State of Florida; that the paper writings were indefinite, uncertain, contradictory, and, in the material matters aforesaid, utterly repugnant to each other."

We will only say in reference to this return, that our conclusion is directly the opposite; that it shows that an election was held, as it states in direct terms that it was held under existing laws of the State of Florida, and the paper writings were not indefinite, uncertain, contradictory, or in any sense repugnant to each other. The returns were regular, conformable to law, and corresponded each with the other in every material part and word, except that one contained the votes cast for constable while the other did not. Both stated the same facts from the beginning to the end, except as to constables, and the votes should be canvassed and included in the returns to be made to the proper State authorities.

In reference to the returns from the precinct called the Arredondo precinct, the respondents say that in order to

ascertain the true vote from the precinct, they opened the poll box, and instead of verifying either of the returns by examining the ballots therein found, (which was the alleged purpose of examining the contents of the box,) they found certain figures or numbers on the back of a large number of the ballots, which numbers corresponded with certain numbers marked against names of persons on the poll list. For this reason the respondents determined that these marked ballots were not lawful ballots.

The county canvassers could not lawfully look beyond the face of the returns in ascertaining votes cast for candidates. The statute (Act of 1877, sec. 9, amending section 24 of the act of Aug. 6, 1868,) expressly says of the duty of the county canvassers, "such canvass shall be made solely and entirely from the returns of the precinct inspectors in each election district, as filed by them with the County Judge and Clerk of the Circuit Court respectively, and in no case shall the Board of County Canvassers change or vary in any manner the number of votes cast for the candidates respectively at any of the polling places or precincts in the county, as shown by the returns of the inspectors of such polling places or precincts."

The county canvassers have only to determine whether the paper is a return or certificate signd by the inspectors, and then, if it is possible to ascertain the number of votes cast for each person for each office voted for, compile the figures from the several returns and certify the aggregate to the proper officers whose duty it is to receive and canvass the county returns. This plain duty is set forth in the law too clearly to be misunderstood by county officers. This rule has been observed in every case where this question has come before the courts of the various States upon similar statutes. The county board has no judicial discretion, and no power savoring of judicial judgment beyond ascertaining that the returns are signed by the persons appointed

or elected, as provided by law, to be inspectors of the polling places, a power incident to their office in the performance of their ministerial functions.

Counsel for respondents suggests that the county judge and the clerk, being the only officers expressly designated to be members of the canvassing board, (except that the sheriff shall act in the place of either of them who may be absent, &c.,) and that a Justice of the Peace shall be called in by them to be a third member of the board, and that, therefore, the writ of mandamus cannot go against the justice, as no individual justice is designated by the law.

There are some adjudications in which the writ was allowed as to the officers designated, to-wit: the judge and clerk with directions to call in a justice. But here the judge and clerk have appointed a justice of the peace to act as the third member of the board, to-wit: Edwin A. Castellaw, and these three officers met and organized themselves into a canvassing board for the county of Alachua, and entered upon their duties and canvassed a portion of the returns, but have omitted fully to perform their duties under the law.

In the State of Iowa, *ex rel.* Rice, 9 Iowa, 344, the court says: "The order of the peremptory writ extends to the justices as well as to the county judge, in its legal effect. If it were not so they might defeat the object intended, and so it would be in this case. The judge with the justices, as canvassers, must do what is commanded by the writ. Therefore, the writ of attachment should have issued against the justices as well as the judge. The only discretion now left them is to compute the vote for the respective places."

In the present case, Mr. Castellaw, having become according to law a member of the board of canvassers, he is as fully a member and amenable to this proceeding as the

other officers who are members of the board under the same statute.

Mr. Castellaw, the Justice of the Peace, was not served with the alternative writ, the sheriff not being able to find him. But he was served with due notice of the application to this court in the first instance, and has failed to respond. The notice was served by a person, not an officer, who makes his affidavit of the service of a copy of the petition for mandamus as well as notice of the time and place of its presentation to this court. This is sufficient. The notice served gave him every opportunity of defence that could have been obtained by an alternative mandamus. Board of Commissioners of Knox county, vs. Aspinwall, 24 How. 376; People vs. Pearson, 1 Scammon, 458; Home Insurance Company vs. Schiffer, 12 Minn., 382; *ex parte* Rogers, 5 Cowen, 526.

The demurrer of the relator is sustained.

A peremptory writ is awarded against the respondents, Gardner, County Judge, Carlisle, Clerk of the Circuit Court, and Edwin A. Castellaw, Justice of the Peace, of the county of Alachua, as prayed, commanding them to proceed, and canvass all the returns of the election received from the several precincts or polling places in Alachua county, and make returns or certificates of the result of said election, in said county, as shown by all of said returns, to the Secretary of State, and to the Governor of the State of Florida, and that they do perfectly execute said writ of mandamus; and how they shall have executed it, make return to this court on or before the twenty-sixth day of November, A. D. 1878, at 10 o'clock A. M., to be filed in the office of the Clerk of this Court.

The peremptory writ issued pursuant to the judgment of the court, requiring performance to be made before or on the 26th day of November, 1878; and a return of per-

formance to be filed in the office of the Clerk of the Supreme Court on the same day.

The respondents filed in the Clerk's office of the Supreme Court a return in the shape of a certificate, stating that *on the 25th day of November,* in compliance with the command of the writ, they reassembled and canvassed the votes given at the election; and that from the returns on file in the office of the Clerk of the Circuit Court the whole number of votes cast for Representative in Congress was 2,923; and that of these Noble A. Hull received 1,178 votes; Horatio Bisbee received 735 votes; Horatio Bisbee, Jr., 751 votes; Horatio Bisby, Jr., 68 votes; Horache Bisbee received 191 votes. The return also states the number of votes cast for members of the Assembly and Constables, and who received them, and then concludes as follows: "While we make this canvass under the order of the court, we certify that the precinct returns are so irregular, false and fraudulent that we are unable to determine what the true vote of Alachua county is for Representative in Congress and for members of the Assembly."

This return, while failing to comply with the rule laid down in the case of The State *ex rel.* Drew vs. Board of State Canvassers, (16 Fla.,) which rule requires a mere statement of performance of the requirements of the writ, omits, in its recital of what had been done, to state whether or not the certificates declaring the whole number of votes given for each office, and the names of the persons voted for, and the number of votes given for each person, had been transmitted to the Governor and the Secretary of State, as required by the statute.

The relator then moved for a writ of attachment against the respondents, or for further order of the court, commanding them to obey the writ of mandamus, or show cause why they should not be attached for contempt.

The motion was argued by the relator, and afterwards, on the 2d day of December,

MR. JUSTICE WESTCOTT delivered the opinion of the court.

Determining the sufficiency of this response by the rules announced in the case of Drew vs. The State Canvassers, (16 Fla., 60 and 61,) it is informal and insufficient.

There is here no allegation that the certificate required by the law and the writ, to be forwarded to the Governor and the Secretary of State, has been so forwarded; and the certificate returned is not a certificate of obedience to the writ strictly, but a certificate of a canvass made, concluding with the statement "that the precinct returns are so irregular, false and fraudulent that we are unable to determine what the true vote of Alachua county is for Representative in Congress and for members of the Assembly."

Anterior to the issuing of the peremptory writ in this case, this Board had canvassed the returns which were not the subject of this proceeding, and had failed to count returns which it was the purpose of this proceeding to cause them to count and return.

The granting of a peremptory mandamus implies that the party has been fully heard, or has had the opportunity for such hearing. Therefore it is, that he can allege no reason why he has not oboyed it. 1 Ibid., 416; 16 Fla., 60.

The allegation, therefore, in this return, as to irregularity of returns, is improper. Their duty under this writ is simply to canvass and add up the returns as ordered, and to make and forward the certificates required by law. A simple statement that all of the acts required to be performed by the peremptory writ have been performed, is all that is necessary.

The matter of a response in a mandamus proceeding is fully treated in the case of Drew vs. The Board of State

Canvassers, (16 Fla., 60,) and what is here said is but a repetition of the views there expressed.

If the statement or response is not true, then upon proper allegations and proofs, either a rule to show cause or an attachment for contempt will issue.

In this case the response does not show such compliance.

Let an order be issued repeating the mandate of the peremptory writ, and directing a strict compliance with the order and direction of the court in this behalf, and that the respondents do perfectly execute the duty heretofore and hereby enjoined upon them by ten o'clock of Thursday morning, the 5th day of December, A. D. 1878; and that a rule be issued, returnable at the same time, requiring the respondents to show cause why they should not be attached for contempt.

An order of the court repeating the command of the peremptory writ and requiring a strict and perfect performance by the respondents on or before December 5, 1878, of the duties so required of them, and that they make return on that day by ten o'clock A. M. in writing, and show cause why they should not be attached for contempt, was issued and served on respondents.

On the 5th day of December, the respondents made returns to this order. In one return they state that on the 4th day of December they reassembled in the office of the Clerk of the Circuit Court, and solely and entirely, from the face of the returns on file from the different precincts in the county, canvassed the votes cast at the election held on the 5th of November, 1878; and that they made a certificate in triplicate and forwarded one to the Governor of the State and one to the Secretary of State, and the other they enclosed with the returns to the court, and that they have omitted all matter indicated by the opinion of the court to be improper.

The triplicate certificate transmitted to the court and referred to in the above return, returned the votes just as they appeared upon the precinct returns for "Noble A. Hull," "Horatio Bisbee," "Horatio Bisbee, Jr.," "Horatio Bisby, Jr.," or "Horache Bisbee," and as they were returned in the former return of the canvass of November 25. No exception was taken to this by the relator.

The respondents also made a return showing cause why they should not be attached for contempt. It is substantially as follows:

"That they are not now, nor have they ever intended to be in contempt of your honorable court, but, on the contrary, have at all times felt a pride in common with the good citizens of their county, in the justices of said court for their purity of character and lofty attainments as jurists, and have always as citizens and as officers, and are now willing to cheerfully comply with all of its mandates, and as good citizens to humbly submit to the authority of those who rule over them.

"Feeling that they had complied fully and to the letter with the mandate of the court, in counting and canvassing *solely* and *entirely* from the election returns of the precinct inspectors, from all of the election districts in the county, as filed by the inspectors with the County Judge and Clerk of the Circuit Court, respectively, and in no case changed or varied in any manner the number of votes cast for candidates, respectively, at any of the polling places or precincts in the said county, as shown by the returns of the inspectors of such polling places, filed or delivered by them to such judge or clerk, and had faithfully and honestly compiled the result of the election as shown by the returns of the inspectors, and had made certificates in words and figures written at full length of the whole number of votes given for such office, the number of persons for whom such votes were given for such office. Seeing

that the consolidation of the returns of the inspectors presented such an *irregular, false* and *fraudulent* appearance, and being by the decision of your honorable court prohibited from examining the ballots, poll-lists, &c., (they by said decision not being a part of the return of the inspectors,) to sift, investigate and arrive at a conclusion for whom the *ballots* had been cast, came to the conclusion (before signing their names as canvassers) that they would insert the further certificate declared by the decision of your honorable court to be a violation of your mandate of a former date, simply as an *expression* of *opinion* and with no design whatever to change, alter, or confuse the result as made by their said canvass; that they in no manner meant or intended any contempt or disregard of the order of your honorable court."

Afterwards, on the same day, the court having considered the same,

MR. JUSTICE WESTCOTT delivered the following opinion:

The respondents on this the 5th day of December, A. D. 1878, file an additional response to the peremptory writ herein issued, setting up a compliance with its mandate as to the returns of the election for Representative of the Second District of Florida, in the 46th Congress of the United States. With this is filed a certificate setting up the votes cast at said election for members of the Assembly of the State of Florida and other officers.

The proceedings in this cause concern only the votes cast for Representative in Congress. Matter not pertaining to this subject is surplusage and should be stricken out. 16 Fla., 62.

The court considers that the respondents have substantially complied with its mandate in this behalf.

The relator not objecting, the return is accepted as suffi-

cient, and the rule to show cause why an attachment for contempt should not issue herein is discharged, the respondents to pay the costs of these proceedings.

Let a final judgment be entered accordingly.

THE STATE OF FLORIDA EX REL. H. BISBEE, JR., VS. TH5 INSPECTORS OF ELECTION AT PRECINCT NO. 4 OF MADISON COUNTY.

Peremptory writ of mandamus refused under circumstances showing that it would be certainly fruitless to the relator if issued.

Relator alleged that the respondents were inspectors of election at Precinct No. 4, in Madison county, at an election held for Representative in Congress, at which votes were cast for the relator, and that respondents had neglected to make due return of the votes cast at that precinct, and prayed that they be required to make a return to the County Clerk as required by statute.

Respondents made answer to an alternative writ that they had made and signed duplicate returns of the votes cast in due form, and had forwarded the same to be delivered to the County Clerk by one of their number, and that on the road the said returns were stolen from the messenger and have not been recovered, and they or either of them have no knowledge or information as to whether the said returns are now in existence or where they may be found. They further say they have no memoranda of the vote cast for the candidates for the several offices voted for, and do not remember the said vote, and know of no means

that the consolidation of the returns of the inspectors presented such an *irregular, false* and *fraudulent* appearance, and being by the decision of your honorable court prohibited from examining the ballots, poll-lists, &c., (they by said decision not being a part of the return of the inspectors,) to sift, investigate and arrive at a conclusion for whom the *ballots* had been cast, came to the conclusion (before signing their names as canvassers) that they would insert the further certificate declared by the decision of your honorable court to be a violation of your mandate of a former date, simply as an *expression* of *opinion* and with no design whatever to change, alter, or confuse the result as made by their said canvass; that they in no manner meant or intended any contempt or disregard of the order of your honorable court."

Afterwards, on the same day, the court having considered the same,

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The proceedings in this cause concern only the votes cast for Representative in Congress. Matter not pertaining to this subject is surplusage and should be stricken out. 16 Fla., 62.

The court considers that the respondents have substantially complied with its mandate in this behalf.

The relator not objecting, the return is accepted as suffi-

DECISIONS

OF THE

Supreme Court of Florida,

AT A

SPECIAL TERM

CONVENED JANUARY 2, A. D. 1879.

THE STATE OF FLORIDA EX REL. H. BISBEE, JR., VS. THE BOARD OF STATE CANVASSERS.

1. It is not good ground of demurrer to an alternative writ of mandamus directing a canvass of votes for Representative in Congress, that the relator does not show that he is qualified to take the office; the question of eligibility belonging exclusively to Congress to determine.

2. The Statute authorizes the Board of State Canvassers to lay aside and not include in their canvass the county returns or papers purporting to be county returns, when it appears to them that such returns are "so irregular, false or fraudulent" that the board cannot "determine the true vote" for any office, *i. e.* the vote actually cast. The law requires the county canvassers to canvass the precinct returns received on the sixth day after the election, whether the precinct returns from all the precincts are then in or not; and further requires the county board to certify the result of this canvass to the State canvassers, to be included in the State canvass, unless they are shown or appear to be of the character above described. The returns from one county were shown to have been complete except that no return had been made to the county board of votes cast at one poll, and no vote from that poll was included

in the county canvass and return to the State Board, and for this reason the State Board did not include the vote returned from that county, on the ground that it was so irregular or false that it did not show the "true vote;" upon this state of facts it was *held*: That the county return was in no wise so irregular or false, within the meaning of the law, that the State Canvassers could not determine the "true vote" from such return; that the county return being genuine, regularly and strictly legal in all respects, and required to be made for the purposes of the State canvass, and included only votes actually cast, it could not be condemned as "false," but was a return expressly required by law to be counted.

[WESTCOTT, J., dissenting, thought the return from Madison county was "false" within the meaning of the statute.]

3. A certificate signed by a majority of a board of precinct inspectors of election, showing the vote cast at such precinct, is a valid return of the election, and the omission or refusal of one of three acting inspectors, who refused to join the other two inspectors in signing the return, is not an irregularity in the return.

4. The omission to send to the Clerk's office the oaths of inspectors of election or the poll-lists is a violation of duty on the part of inspectors, but does not invalidate a return of the votes cast at the precinct.

5. The law directing the precinct inspectors to seal up their return of the votes cast before forwarding it to the clerk is directory only, and does not vitiate the return.

6. The certificate of inspectors of an election to a fact not required by law to be certified by them, cannot be received by the county canvassers to invalidate a regular return.

7. Mere irregularities in the conducting of an election, or in making returns to the county board of canvassers, will not authorize the State Board of Canvassers to exclude the county return from the State canvass.

8. It is not a good plea to an alternative writ of mandamus, directing a complete canvass of all the regular, unimpeached county returns, that a certificate of election had been issued to one declared elected upon a canvass in which certain county returns had been rejected which should have been counted, as the relator is entitled to demand a legal canvass of votes cast and duly returned, and a declaration of the result.

The alternative writ sets up the facts that the relator was a citizen of the State of Florida, and one of the candidates for

Representative in Congress at an election held in the Second Congressional District, on the 5th day of November, 1878, and received a majority of the votes actually cast and duly returned to the Board of State Canvassers.

That on the tenth day of December, 1878, the said respondents, as a Board of State Canvassers, organized, and proceeded to canvass the returns of said election, and that they did improperly reject a *bona fide* return of votes cast in Madison county, and refused to include in their said canvass the entire return of votes from said county, on the ground that there was no return made from one precinct in said county to the county board of votes cast in such precinct, and such votes were not included in the return made by the county canvassers to the State Board; and that by so rejecting the county returns of Madison county, the relator was deprived of a certificate of election to which he would have been entitled if such returns had not been so rejected. He therefore demands that the State Board be required to convene, and canvass, and count all the *bona fide* returns of said election, including those from Madison, and declare and certify the result, and perform such other duties as are required by law in the premises.

The respondents filed their demurrer to the alternative writ upon the following grounds:

1. It does not show that the relator is twenty-five years of age.

2. There was not, nor is there any statute or law of the State of Florida, providing for the election of a Representative in Congress from the Second Congressional District of said State.

3. The said writ shows that the said return from Madison county does not show or represent the true vote cast in said county at said election.

H. Bisbee, Jr., in pro. per.

J. F. McClellan and *D. S. Walker, Sr.,* for respondents.

THE CHIEF JUSTICE delivered the opinion of the court.

Upon the first ground of demurrer, that the relator is not shown by the alternative writ to be twenty-five years of age, we remark that the title to the office not being by any possibility liable to be controverted in a proceeding of this character, any peculiar qualification prescribed by the Constitution of the United States for members of Congress, can be tried only by the Congress. This proceeding seeks only to procure such certificate as the candidate voted for may be entitled to under the laws of this State, which certificate is a property which the person obtaining the most votes is authorized by law to demand. Upon this inquiry the right to take and hold the office is not in question, and a slight examination of the rules laid down in the books does not show that such a question has ever been entertained by the courts. Whether the relator possesses all the qualifications necessary to entitle him to a seat in Congress, is a matter than can only be inquired into by the House in which he may present a certificate of election.

The relator shows in the pleadings that he is a citizen of this State, and was voted for at the last general election for Representative in Congress from the Second District, and that he received a majority of votes actually cast and duly returned, and that such votes have not been counted in full, so that a certificate of election is withheld from him. If all this is true, no person other than himself is entitled to the certificate of election, and whether the one or the other is entitled to the seat, cannot be tried before a State court. The question raised, therefore, by the first ground of demurrer is not material in this court. Were this a proceeding under a writ of *quo warranto* to test the right to a State office, the question of eligibility would be

material. The first ground of demurrer is not sustained. The second ground of demurrer was abandoned upon the hearing.

We proceed then to consider the third ground of demurrer, involving the only material question before us.

We do not find anywhere in the opinion or judgment of this court in the case of Drew, relator, against the State Canvassers, (16 Fla., 17,) or in any other case decided by this court any expression which will warrant the exclusion by the State Board of a return which is regular, genuine and *bona fide,* merely because the board are informed and satisfied that votes cast at a precinct (of which no return was made to the county board) were not included in the return made by county canvassers to the State board. The power of this board "is limited," (as is expressly stated in the opinion of the court in that case,) "by the express words of the statute which gives them being to the signing of a certificate containing the whole number of votes given for each person for each office, and therein declaring the result as shown by the returns." The judgment of the board may be invoked to lay aside a county return and omit to include it in the statement and determination of the result of the election, when it shall appear to them that the return is "so irregular, false or fraudulent" that it does not show the true vote, but does represent votes not cast according to the precinct returns made to them; or, in other words, that the return in the hands of the State board is not made up in good faith from such precinct returns, but is a thing manufactured, an attempted imposition upon the board, or of such character that it represents falsehood instead of the truth, as to the precinct returns of votes actually cast, and is, for such reason, not a lawful return of an election.

In the case referred to, the court says: "The words 'true vote' (used in the statute) indicate the vote actually

cast, as distinct from the legal vote." The court was considering whether the power of the board to dissect returns and reject such votes as may have been illegally cast was included in the language of the statute, and it was decided that they had no such power under the statute, and that the power given was confined to a determination as to the character of the return, whether it was regular, genuine, *bona fide,* a true or false compilation of precinct returns. This power was deemed incident to the character of the office of the canvassers as created and defined by law, for the protection of the board and the people from the effect of unlawful attempts to palm off upon them forged and "doctored" papers or wholesale falsehoods. To maintain under our statute that a county canvass based upon votes not cast as a proper return to be counted, would be clearly erroneous.

Is this the character of the return from Madison? Does the return made by the county canvassers of that county bear any of the characteristics that place it among returns that the State board may exclude? Does it include any votes but those actually cast according to the precinct returns? Is it false as to those returns?

It is not pretended that the county canvassers of Madison county have violated the letter or spirit of the law, nor that the return made by them is "irregular, false or fraudulent" within the meaning of the statute.

The ninth section of chapter 3021 (Laws of 1877,) amending the twenty-fourth section of the act of 1868, provides that "on the sixth day after any election, or sooner if the returns shall have been received, it shall be the duty of the County Judge and Clerk of the Circuit Court to meet at the office of said Clerk, and to take to their assistance a Justice of the Peace of the county, * * * and they shall publicly proceed to canvass the votes given for the several officers and persons as shown by the returns on file in the office

of such Judge and Clerk respectively. Such canvass shall be made solely and entirely from the returns of the precinct inspectors in each election district as filed by them with the County Judge and Clerk of the Circuit Court respectively, and in no case shall the Board of County Canvassers change or vary in any manner the number of votes cast for the candidates respectively at any of the polling places or precincts in the county, as shown by the returns of the inspectors of such polling places or precincts. They shall compile the result of the election as shown by said inspectors' returns, and shall then make and sign duplicate certificates, containing in words and figures written at full length, the whole number of votes given for each office, the names of persons for whom such votes were given for such office, and the number of votes given to each person for such office. Such certificates shall be recorded by the clerk in a book to be kept by him for that purpose, and one of such duplicates shall be immediately transmitted by mail to the Secretary of State and the other to the Governor of the State."

The fourth section of chapter 1868 (Laws of 1872,) requires the State Board of Canvassers to "proceed to canvass the returns of said election, and determine and declare who shall have been elected to any such office, or as such member, as shown by such returns," unless the returns are shown to their satisfaction to be vicious, as before stated.

Now, the county canvassers of Madison county have fully and honestly complied with the law. They canvassed and certified all the votes returned to the Judge and Clerk in due form of law.

The statute required them to perform their duty within a certain time, and they performed it. If precinct inspectors failed to return votes from their precinct, still the county canvassers lawfully proceeded without it. The State canvassers "may be authorized by the Legislature

(as said in the Drew case), to inquire into the truth or falsity of the returns sent to them, and if, upon such inquiry, they be satisfied that the return does not show the vote actually cast at the election, but states a falsehood as to that fact, they may lay it aside and refuse to count the return, as is provided in the act of 1872."

The county canvassers of Madison county made a return that contains only the truth and not falsehood. There is no pretense that they have made other than a truthful, legal canvass and return of all the votes cast in the county and duly returned to them, and their returns to the State board are regular and intelligible, according to the pleadings in this case.

It was urged in the argument that if there should be in a given county a large number of precincts, and it should happen that the return of one poll only should reach the county canvassers, and this return only canvassed and returned to the State board, it would be absurd to treat this single poll as a true vote of the county.

This state of things being made to appear, the State board might well consider that there had been improper conduct on the part of the precinct inspectors or messengers, as they would know that the entire vote of the county had not been given to the county board. We will not here instruct them as to their duty in such an extreme case. We submit, however, that because one or more precincts may be disfranchised temporarily by rascality or accident, it does not follow that the residue of the voters of the county should be legally treated in the same manner.

Whether the returns not made would produce a different result of the election would scarcely be determined by a canvassing board, and parties interested would doubtless seek a remedy.

Suppose that at the close of the election at any polling place it should be ascertained that there were one or more

ballots found in the box more than there were names on the poll lists, and the inspectors, under the law, draw out and destroy a number of ballots equal to the excess, so that the lists and the ballots agree in number, and a return is made of the result, excluding the votes so drawn out and destroyed. Yet it may be proved that these ballots were "actually cast." On this showing would the return give the vote "actually cast?" I think it would, though it did not show the entire vote cast. The votes returned were votes actually cast, and the return does not state a falsehood, is not irregular nor a fraud, because it is a lawful return. Yet this return is precisely as false as the return from Madisonn county, and with the same propriety should be rejected.

Neither should be rejected, because both are true and according to law.

Under the law and rules heretofore announced by this court upon the subject, the State board can only investigate the good faith and regularity of the action of the county board and their certificate, when these are challenged, for their own protection and that of the public, and the due exercise of this power is the only protection against imposition.

The omission of the inspectors of a precinct or polling place to make a return to the county board may occasion inconvenience to parties interested in the vote in a contest before a tribunal competent to hear and decide the right to an office, but it is assuredly not the basis of the imputation of fraud or falsehood against the county returns or the county board.

Under the circumstances, in view of the decision of this court in the case of Drew, relator, against the State board, the election return of Madison county does not come "under the condemnation" of that decision.

What the court might say if it was alleged by the re-

spondents that a portion of the returns received by the county board from the precincts had been without cause or arbitrarily suppressed, may not be appropriate to this case, for no such charge is made. But, for myself, I feel bound to say that, in my judgment, the returns made to the State board in 1876, from the county of Clay, should have been counted for Governor Drew by the board, and had an application been made at the moment, looking to that end, I should have ruled in favor of it. The court, in its opinion on that question, said: "The answer states that thirty-five votes were added (by the State board) upon the ground that said votes had been improperly rejected by the county canvassers of the vote of said county at said election, and that six votes were deducted upon the ground that said votes were cast by non-residents of the county. It follows, from the view we have taken of the law applicable to the powers and duties of the State canvassers, that any statement of votes by precinct inspectors which were not included in the canvass made by the canvassing board, cannot be counted by the State board, the powers of the latter being confined by law to counting only such votes as are duly returned by the county board."

I understood then as now, that this was a sufficient indication to the State board that the returns from Clay, so far as they gave evidence of "actual votes," should be counted, there being no alleged evidence of fraud or falsehood as to the returns so made by the county board; but that the precinct returns had been rejected by that board in making the county canvass solely (yet honestly) upon insufficient grounds.

The State board had at first included the Clay county returns in their canvass, embracing not only the votes regularly returned, but also the votes mentioned in the precinct returns which the county board had omitted to include in their final return to the State board.

The comments of the court, referring to the Clay county returns, condemned the action of the State board in including the thirty-five votes from the rejected precinct returns, and the court said they could not be counted by the State board, their powers being confined by law to counting only such votes as are duly returned.

It strikes me that if the opinion of the court had been that the regular returns of votes from Clay county should not be counted, by reason of the omission to include the precinct votes mentioned, the court would have so expressed itself, which it did not do, but used the language above quoted.

But the returns from Madison county are not in the same condition. The canvassing board of Madison counted and duly certified to the State board all the returns made to them; the law above quoted required them so to do without reference to returns they did not have, and the law required the State board to count such unimpeached returns.

The demurrer is overruled.

MR. JUSTICE WESTCOTT, dissenting, delivered the following opinion:

Not differing with the conclusions of the court as to the first and second grounds of demurrer to the alternative writ of mandamus in this case, I say nothing as to the matters therein set up.

Differing, as I do, from its conclusions as well as its reasoning upon the third ground of demurrer, a brief statement of the case is necessary to enable one to appreciate the exact question presented by that ground of demurrer.

This is a proceeding by mandamus seeking to control the Board of State Canvassers in the matter of their canvas of votes cast at an election for Representative from the

Second District of Florida in the 46th Congress of the United States, the relator being a candidate at said election.

In the canvass of votes by the Board of State Canvassers cast in the county of Madison, one of the counties composing the said Congressional District for said Representative in the 46th Congress of the United States, the alternative writ alleges that the State Board omitted and failed to count the votes returned by the board of county canvassers for that county. It admits the fact also that said return of the county board did not embrace the votes actually cast at district number four in said county, the relator alleging upon information and belief that at said district 186 votes were cast for him, and 129 votes were cast for Noble A. Hull, who was, with himself, a candidate for said position. The relator avers also that the return from the county of Madison embraced all the votes cast for said office in the county, as shown by the returns on file in the offices of the county judge and clerk, and that no return from the 4th district was before them. The demurrer admits these facts. The question involved, therefore, is whether under the law the Board of State Canvassers should count a county return, *which, it is admitted, does not embrace the actual vote cast at the election* in the county by 315 votes, an entire precinct in a county; it being likewise admitted that it does embrace all the votes of precincts or districts which were returned to the clerk and county judge. To this question I address myself.

The first question which arises here in connection with the general question as stated is, did the State Board have the right to ascertain this fact as to the *actual vote cast at the election*, outside of what appeared on the face of this return? The alternative writ to which this demurrer is interposed alleges as facts that the return from Madison county omits this precinct, is regular upon its face, and is the *bona fide* act of the county board. If the State Board is

limited in its enquiries to the face of such return, then the fact of omission of this precinct not thus appearing in this case, and the board having no power to go beyond its face to make such enquiry, the necessary legal result would be that the act of the board was unauthorized by law; that they should have counted the return as it appeared, and the result would be that the peremptory writ should be granted. Such was the view of relator's counsel in the case of Drew vs. Board of State Canvassers, (16 Fla., 22, 34, 35,) if I understand the pleadings and briefs therein. In my judgment, this question was there directly presented for consideration, and was determined. As that opinion, however, was written in a few hours, and for that reason was necessarily brief, although I think in no respect erroneous, I will not content myself with a simple narration of the conclusions there stated. Justice to myself, and a due regard for the importance of the principle involved, justifies its more elaborate discussion. I shall discuss this question, first, as though it was *res integra;* shall, in the second place, show what the court determined in that case in reference to this question; and in the third place shall show that the question was presented by the pleadings in that case for determination, and that the expression of opinion there as to this point was not an *obiter dictum,* but was the decision of a question plainly involved.

The statute controlling the State Canvassing Board, after providing for its organization, directs that it shall "proceed to canvass the returns of said election, and determine and declare who shall have been elected to any such office, or as such member, as shown by such returns. If any such returns shall be shown or shall appear to be so irregular, false or fraudulent that the board shall be unable to determine the true vote for any such officer or member, they shall so certify, and shall not include such return in their determination and declaration, and the Secretary of State

shall preserve and file in his office all such returns, together with such other documents and papers as may have been received by him or by said Board of Canvassers. The said board shall make and sign a certificate, containing in words and figures written at full length, the whole number of votes given for each office, the number of votes given for each person for each office and for member of the Legislature, and therein declare the result." It needs no argument to show that, under the statute, the basis of the determination and declaration by the board as to who shall have been elected to any office must be the returns; and that their action must correspond to what is shown by the returns. When, however, such returns shall be shown or shall appear to be so irregular, false or fraudulent that the board shall be unable to determine the true vote for any such officer or member, they shall so certify, and shall not include such return in their determination. If this clause be a grant of power in conformity to organic law, then in the event it is shown or appears that a county return is irregular or false or fraudulent, within the meaning of this section, there certainly can be no doubt that the State Board must not count such return. Again, as the statute provides that "the Secretary of State shall preserve and file in his office all such *returns, together with such other documents and papers as may have been received by him or by said Board of Canvassers,*" it is equally clear that the papers and documents which may be considered by the board in making their determination are not the *returns alone,* (which, under the law, are required to be sent by the county canvassers *to the Governor and Secretary of State,*) but in addition to the returns, are *such other papers as may have been received by the Secretary of State and the board.* Unless it can be maintained that returns are not only returns, but returns and papers and documents *other than returns,* and I presume no sane man would endeavor to establish such a proposition,

then, under this statute, the board, in determining this false, irregular or fraudulent character of returns, may look beyond the face of such returns, and examine and receive papers and documents other than returns. Again, under the law, the county returns are sent alone to the Governor and Secretary of State. They are not sent *directly to the board,* and yet the board are authorized to receive papers themselves, for the law directs what disposition is to be made of such papers when received.

Again, the law, defining the duties of the county canvassers, provides that the canvass they are to make, "shall be *made solely and entirely* from the returns of the precinct inspectors in each election district, filed by them with the County Judge and Clerk of the Circuit Court respectively, and *in no case* shall the board of county canvassers *change or vary in any manner* the number of votes cast for the candidates respectively, at any of the polling places or precincts in the county, as shown by the returns of the inspectors of such polling places or precincts. They shall compile the result of the election as shown by said inspectors' returns, and shall then make and sign duplicate certificates, containing in words and figures written at full length, the whole number of votes given for each office, the names of the persons for whom such votes were given for such office, and the number of votes given to each person for such office." The law then provides that one of such certificates shall be sent to the Governor and one to the Secretary of State. This court, in The State vs. The Board of Canvassers of Alachua County, (17 Fla.,) determined, but a few weeks since, that under this statute the duties of the county board were solely ministerial, and that, in making up their canvass, they were to compute the inspectors' returns and nothing else. In view of the very exact, precise and restrictive language of this statute, and the opinion of this court interpreting it, in the case referred to, it is clear that the

law prohibits the county board from placing upon the *face of its return* to the Governor and Secretary of State anything except what is shown "solely and entirely" from the returns of the precinct inspectors, in each election district, and "in no case" shall they change or vary "in any manner" the number of votes cast, as shown by the returns of the inspectors of such precinct. If it is a return from a precinct, made by the inspectors of such precinct, then, no matter how false or fraudulent it may be as to the vote cast, and independent of the question whether it contained more or less than the votes cast, it must be canvassed and counted by the county board. Not only is this true, but in addition to all this, there may be a consideration for the act, and yet the return must be counted. This is the effect of the decision of this court in the case of The State *ex rel.* H. Bisbee, Jr., vs. The Board of County Canvassers of Alachua County, lately decided by this court. This being so, then, if the county board strictly performs its duty, and restricts itself to placing upon the face of a return that only which the law authorizes it to place there, a return made to the Secretary of State can never, and should never, show upon its face either falsehood or fraud, for, to place anything of that character upon its face would not only be an irregularity, but a clear, plain violation of the law which defines their duties in this very particular, and the act of the Legislature, which makes it the duty of the State Board to have, for the basis of its certificate, returns not shown or not appearing to be false or fraudulent, becomes nothing, a mere *vox et preterea nihil* in all cases where another board of canvassers have complied with the law defining their duties, this, too, notwithstanding the returns, when considered with reference to the vote actually cast at the election, may be shown, otherwise than by their face, to be both a falsehood and a fraud. Besides, any writing made upon the face of a return by the county board, out-

side and in violation of their power and duty under the law, is entitled to no more consideration than such an act done by an individual. Being beyond official authority, it cannot be treated as an official action. The adoption of this view brings us necessarily to the conclusion, that the Legislature authorizes the State Board to act alone upon returns not shown to be false, and, at the same time, limits them in their investigation of the fact of falsehood to an official paper, which, if legal and in proper form, can never establish the fact of falsehood. The signification of the words, "shown or shall appear," in this section, are to be determined, as in every other case of like investigation, by the nature of the thing which is to be shown or to appear. That which is to be shown here is the irregularity, the falsehood or fraudulent character of a return, purporting, upon its face, to contain the votes cast at a general election held in a county; and as a county return may be legal and formal and regular in its character, and yet false as to the votes cast or given in a county, (the matter of inquiry,) the nature of the thing to be shown or to appear necessarily excludes and prevents such interpretation or construction of the statute as limits the enquiry to what is shown or appears by the return. The reasonable, the fair, the simple interpretation of the language of this statute is entirely in conflict with this view. It is a fundamental and elementary rule of construction, prevailing in all courts in England and America, that when this is the case, the duty of a court is to declare the plain intent, the clear meaning of the statute, unless it is shown that the literal and simple construction of the language employed is clearly not within the intention of the Legislature, and that something else was.

Here, as I have demonstrated, the view that the State Board is restricted to the county return in determining its falsehood, is directly opposed to the intention of the Leg-

islature, because the fact of falsehood cannot legally and properly appear therefrom in any case, and the Legislature contemplated that it might be shown or appear, if it existed. To my mind, therefore, this construction of the statute is clearly wrong. It is useless, in this connection, for those who advocate this rule, to cite decisions of other State courts to the effect that under *their statutes* a State Board is restricted in its enquiries to the genuineness of the return before them. The statutes they are construing are essentially different from ours. They authorize no inquiry as to the falsity or truth of a return when it speaks as to the votes cast. Our statute does authorize this specific inquiry, and to adopt the decisions referred to would be an usurpation of legislative functions by a judicial tribunal, for the act would be simply the repeal of a statute under the forms of judicial proceedings.

This view that the State Board could determine the falsity of a return by inquiry *aliunde* its face, is sustained by what is said in the case of Drew vs. State Canvassing Board, (16 Fla., 45.) This court there said: "The clear effect of this clause" (meaning the clause regulating the canvass of returns by the State Board) "is that a return of the character named" (meaning thereby the irregular, false or fraudulent character mentioned in the statute,) "shall not be included in the determination and declaration of the board, and that it has power to determine the *bona fide* character of the returns *dehors* their face." The court in that case also said, when interpreting section 5 of Article XIV. of the Constitution, that "the necessary conclusion is that said officers may be authorized by the Legislature to inquire into the truth or falsity of the returns sent to them, and if upon such inquiry they be satisfied that the return does not show the *vote actually cast at the election,* but that it states a falsehood as *to that fact,* they may lay it aside and refuse to count the return, as is provided in the act of 1872."

This question as to enquiry beyond the face of the returns was involved in the determination of the demurrer of the relator to the answer of the respondents in that case. This answer alleged as to the return from one of the counties that it did not "include the vote cast in said county as it appeared on the face of the return, upon the ground *that it appeared in evidence* that there was such irregularity and fraud in the conduct of the election in said county in receiving the votes of persons not registered, and there being no registration list furnishd inspectors and no designation of voting places, and no notice of election, that said board could not ascertain the true vote." (16 Fla., 31,) Allegations as to the reception of evidence offered by both sides, and enquiry beyond the face of the return, are also found in other portions of the answer to which this demurrer was interposed. (16 Fla., 27.) The alternative writ of the relator himself stated that the board had received "exparte affidavits to impeach the returns," that they had "exceeded their powers," and that "they should have confined their canvass of said returns" to what was shown or appeared on the face of said returns." (16 Fla., 22.) A demurrer to such an answer preceded by such an alternative writ and sustained by briefs of counsel discussing this very point, certainly presented it for the consideration of the court, and an announcement by the court that it did not think the pleadings involved the point could have been well met by an intelligent bar with a smile, indicative of an emotion much less complimentary in its character than an expression of surprise.

My conclusion, therefore, as to this point is, that the State Board was not obliged to accept the face of the returns, and that the matter of its falsity could be ascertained *dehors;* its face that such is the plain meaning of the statute as well as of the decision in the case reported in 16 Fla. The alternative writ here does not state the method

of inquiry by which the board ascertained the fact that 315 votes (the vote cast at one precinct) were not embraced in this return, and, therefore, no question as to the legality of the method adopted, whatever it may have been, to ascertain this fact, is presented.

Having thus shown that the State Board has the authority to look beyond the face of the return to ascertain whether it states the truth, and the alternative writ in this case setting up and admitting the fact as known and ascertained by the board that the entire vote at one precinct in the county (315 in number) was not counted, the only remaining question arising upon this demurrer which it is essential to consider is, was this a *false return* within the meaning of the statute? If it was, then the State Board properly laid it aside and did not count it. If it was not a false return, (there being no question as to regularity or fraud,) then they should have counted it.

I shall first consider this question in reference to the case of Drew, (16 Fla.,) and shall, in the second place, examine the opinion of the court now rendered and compare it with what was decided in that case. In the case of The State *ex rel.* Geo. F. Drew, the respondents alleged in their original answer that votes were added in some cases to those embraced in county returns, and that in other cases votes were deducted from those returned, on the ground that the return did not represent the true vote, meaning thereby the legal vote of the county as distinct from the actual vote cast. These answers being entirely too general in their character, upon motion of the relator the court required them to be amended so as to set forth the specific grounds of rejection or addition in each case. In the answers, original and amended, the fact appeared that the Board claimed and exercised pure judicial powers, that is, a right to determine whether a vote cast was a legal vote, and other powers of like character, upon the ground that such ille

gality rendered the return irregular, false or fraudulent, within the meaning of the statute, and that the words "true vote" meant the legal vote. To these answers, original and amended, the relator demurred. Admitting that a case was made by the alternative writ, the question presented was, do the facts set up in such answers, original and amended, constitute in law a reply to the alternative writ? Did they show a performance of their legal duty? What were these facts? In the first place there was, as against a regular return, the determination that a number of votes embraced therein were illegal, and that an election was illegal. This was the exercise of *general judicial power,* a power which related to the ultimate final right to the office, as contra-distinguished from the right to a certificate which, under the law, was simply to constitute "*prima facie* evidence of election;" a thing no more final in its character than a certificate of an election granted by the Secretary of State to a person who appears from the canvass of returns from a county to have been elected to the Legislature. This question thus clearly presented was disposed of by the court in this language: "The *general* nature of the power given by the statute is ministerial, and that to the extent that any *strictly* and *purely* judicial power is granted, such power, cannot exist." (16 Fla., 44.) It is unnecessary to repeat here the grounds upon which this conclusion was based. I do not understand the court to differ from me in this view, and it is unnecessary to say more. The next question presented in the case of Drew was the signification of the words "true vote" and of the words "irregular, false and fraudulent," used in "connection" with the words "true vote." The words "true vote" and the words "irregular, false and fraudulent" in "connection" therewith, are found in the answer as to Manatee county. Like words are used in the answer as to Jackson, Hamilton and Monroe, (16 Fla., 27,) and under the demurrer these questions were

properly presented. The court, in disposing of them, said: "While the *general powers* of the board are thus limited to and by the returns, still as to these returns the statute provides that 'if any such returns shall be shown or shall appear to be so irregular, false or fraudulent that the board shall be unable to determine the true vote for any officer or member, they shall so certify, and shall not include such return in their determination and declaration; and the Secretary of State shall preserve and file in his office all such returns, together with such other documents and papers as may have been received by him or by said Board of Canvassers.' The words 'true vote' here indicate the vote *actually cast,* as distinct from the legal vote. This follows, first, from the clear general duty of the canvassers, which is to ascertain and certify the 'votes given' for each person for each office, and, second, because to determine whether a vote cast is a legal vote is beyond the power of this board." Thus is defined the words "true vote." The court then say, "as to the words 'irregular, false and fraudulent' in this 'connection,'" that is in connection with the words "true vote" as used in the answer, 16 Fla., 27, "their definition is not required by the pleadings in this case." The court then gave a reason for this, and remark that "these respondents have not alleged that they have before them any return so irregular, false or fraudulent that they are unable to determine the actual vote cast in any county as shown by the returns." The substance of all of which is that the court having determined that the words true vote did not indicate the legal vote but the actual vote, and the respondent's answer having connected these words with the words true vote and legal vote, he had nothing in his answer which raised any question as to their signification when used in connection with the words actual vote.

In view of all this, it certainly cannot be doubted that

this court determined in the case of the State *ex rel.* Drew that the false or true character of a return was to be determined with reference to *"the vote actually cast."* I do not mean by this that any part of the answer of the respondents, or the alternative writ issued, set up in terms a failure of the board to count any return because it was false as to the actual vote cast. No part of the answer which was responsive to relator's case, and to that respondents were confined, set up any such fact. What I mean is that the pleadings, the points presented in argument, indeed everything in the case, required at our hands a decision fixing the meaning of the words "true vote," and as it cannot be denied that the word false is used in connection with the words "true vote," and is to be interpreted in reference thereto, then it necessarily follows, if the words true vote mean "the vote actually cast," that the false or true character of a return must be determined with reference to the vote actually cast.

This, however, is not all that the court said in reference to this precise point in that case. The power of the Legislature under the Constitution of this State to authorize this board to enquire into the falsity of a return and to ascertain that fact by means outside of its face was questioned. While the court sustained the point made that the Legislature could not bestow general judicial power such as was involved in determining the legality of a vote cast, and such like powers, it affirmed in no uncertain language the power of the Legislature to authorize this board to "inquire into the truth or falsity of the returns sent to them." What did this court say? Our language then was, "the constitutional provision that the officers of one department of the government are strictly forbidden to do any act or to exercise any function pertaining to any other department, unless expressly provided for in the Constitution, must be taken in connection with the provision (Sec. 5,

Art. XIV,) authorizing and requiring the Legislature to provide for ascertaining the result from the returns of elections. This is clearly an express authority for providing that returns of elections must be received, considered and passed upon by such officers or persons as might be designated by the Legislature. And the necessary conclusion is that such officers may be authorized by the Legislature to inquire into the truth or falsity of the returns sent to them, and *if upon such inquiry they be satisfied that the return does not show the vote actually cast at the election, but that it states a falsehood as to that fact, they may lay it aside,* as provided in the act of 1872."

This court then said, if it said anything, in the case of the State *ex rel.* Drew, that the words "true vote" in this statute meant the vote actually cast. Not only did it say this, but it also said, "if upon inquiry, they (meaning the State Board) be satisfied that the return does not show the vote actually *cast at the election,* but that it states a falsehood as to that *fact,* they may lay it aside and refuse to count the return."

This brings us to the consideration of the present decision. What does the court now say? Does it say to the board, reject this return, as it fails to include 315 votes cast *at the election* in Madison county? Does it say you can go *aliunde* the return and inquire into this fact? Not at all. If I understand the decision, the board must have nothing to do with the matter of votes actually cast *at the election,* if it appears that he return embraces *less* than the votes cast *at the election,* but embraces all the votes contained in precinct returns which were in the office of the clerk and judge when the county canvass was had and the county return made. In other words, the "fact" as to which and in reference to which the falsity of a return is to be ascertained, is not *"votes actually cast at the election"* was held in the Drew case, but votes actually cast at the election, and, *in addition*

thereto, returned to the county board. To this extent, therefore, it is clear that the court is now making new and additional requirements in order to stamp a return with the character of falsity. The board is here ordered to count a return *which, under the law,* should contain *all* the votes cast at the election in a county, when it is admitted by the relator himself, in his own pleading, that as to that fact it states a falsehood in that it fails so to do by 315 votes. A return containing only a part of the votes cast in a county is not contemplated by the law controlling elections. The intention of the Legislature and the provisions of the statute contemplate only a return embracing "the whole number of votes given for each office" in each county. It contemplates returns from the "inspectors in each election district." If, as in this case, the returns from one precinct are not before the county board, then a case not contemplated by the Legislature arises; a case which perhaps they cannot remedy, because they can only count the returns before them without regard to their false or fraudulent character. They can only determine whether they are returns. But is it true that because the county canvassers are thus restricted in their powers by statute, that the State Board is likewise restricted, when it examines the county returns itself? Clearly not. The State Board is not controlled by the law controlling the county board. Its duties are defined by another section of the law, which gives it power to determine whether that return shows the votes actually cast at the election in the county. Much is said in the opinion of the court as to a county canvass based upon votes not cast. It is said that such a return is not to be counted. This question is not involved in this case, but if it be true that the State Board must count the returns of a county, as to which the county board has performed its duty, and is limited by the action of the county board, then it seems to me this conclusion is an error, because it is very clear

from the statute regulating the power of the county board as this court has defined it, (State of Florida vs. Board of Canvassers of Alachua county, 17 Fla.,) that this board can only enquire as to the genuineness of the return. If it is a return signed by precinct inspectors, they cannot enquire into this fact. They must count it, and if the State Board is to count whatever the county board has legally counted, then it must count such a return. I do not mean by this to express any opinion as to the law in such a case, and only state my view if the rule mentioned controls. It is not necessary that a county return should be both false and fraudulent in its statements as to the votes cast at an election. It may be rejected for either cause. What, however, is a fraudulent return, within the meaning of this statute, and at the same time not a false one, I have never understood. It seems to me that the legitimate legal deduction from the view now expressed by the court is that the State Board cannot go behind the county return, if it represents the performance of their legal duty, and is not affected by some fraud on their part; and, as the county board cannot enquire whether precinct returns show more or less than the vote cast, then, according to this view, the State Board is likewise restricted in its enquiry. The subject matter for enquiry by the State Board is the votes given, the votes cast in the entire county. The county return purports on its face, in all cases, to give the entire return, if it is framed in accordance with the law. This being so, where is the difference between a return shown to contain less than the votes cast, and one shown to contain more, if the falsehood or truth of a return is to be determined, as we said in the Drew case, in reference to "the vote actually cast at the election?"

The court in illustrating its position states the case of a county return embracing votes at a precinct at which some ballots had been withdrawn and destroyed because more

ballots were found in the box than there were names on the poll list. This return, the court says, is precisely as false as the return from Madison county, and with the same propriety should be rejected.

If such a return as this should come before the State Board, that Board would look to its own powers to determine whether the case of a difference between ballots found in the box and the names on the poll list was a case for its consideration. Upon the Board ascertaining that the remedy for such disrepancies which the law prescribed had been applied, it would necessarily conclude that it presented a case beyond its powers, and independent of the question whether such discrepancies would, *under other circumstances,* justify and require them to set the return aside, yet they could not apply this remedy when the law, in clear, plain and unmistakable terms, directed another to be applied, and it had been applied. The court in considering this analogy states, "yet it may be proved that these ballots were actually cast." The law contemplates nothing of the kind. They are destroyed. When such a discrepancy occurs, the Legislature accepts the poll list as showing the number of votes actually cast by voters or persons purporting to be voters. When the ballots found do not correspond with this list, the excess is not dignified by the law with the standing of *a vote.* The law stamps this excess with a seal of condemnation, directs destruction, and nothing can be proved as to these ballots before the State or County Boards.

No such question as this, however, is involved in this case, and what I say is only in reply to the illustration made by the court. This brings me to the consideration of the last subject mentioned in the opinon which I shall discuss, the Clay county returns.

Whether I should say anything in reference to the remarks made in the opinions as to the action of the court in

the case of the State *ex rel.* Drew vs. The State Canvassers, in the matter of the Clay county returns, has been the subject of much consideration with me. At first, as the court remarked in reference to the matter that "the returns from Madison county are not in the same condition" as the Clay county return was in the case referred to, I thought it best to say nothing. If they were not in the same condition, then any remark in reference to the Clay county return in the case of Drew vs. The Board of State Canvassers was not applicable to the return from Madison county here, and the opinion upon its face admitting this fact I thought sufficient. But as any mention of the matter was entirely unnecessary, and the facts stated as being before the court in reference to the Clay county return in the case referred to are erroneous, a correct statement of them as they appeared in the pleadings should be made in order that the opinions as written in the case of the State *ex rel.* Drew vs. The Board of State Canvassers may be shown not to be properly subject to the criticism which the last clause of the remarks made upon the subject contains.

The question before the court as to the Clay county return in that case arose upon the demurrer to the answers of the respondents, original and as amended. The original answer made no mention of Clay county, nor did the alternative writ. The amended answer departed from the case made by the alternative writ. The court's power was invoked by it to correct no alleged error as to Clay county. A reply setting up such action constituted no answer to the alternative writ. The relator, so far as the case made by his petition and the alternative writ of the court disclosed, made no complaint of the board's action as to this return. A reply in this case stating action as to some county other than Madison, of which the relator did not complain, and which did not affect his ultimate right to the certificate, would present a like case. But counsel in the case, actu-

ated by a laudable purpose and wish, as was frequently expressed at the bar, to have a full adjudication upon the merits, made no such objection. Now what were the precise facts as to the Clay county return before the court upon this demurrer? I quote the exact language of the amended answer: "And these respondents further say, that in the County of Clay twenty-nine votes were added to the vote cast for George F. Drew, and six votes were added to the vote cast for Marcellus L. Stearns, upon the ground that said votes had been improperly rejected by the county canvassers of the vote of said county at said election. And further in relation to the said county of Clay, that four votes cast for George F. Drew at said election were deducted, and two votes cast for Marcellus L. Stearns were deducted, upon the ground that said votes were cast by non-residents of the county." 16 Fla., 30.

This answer does not contain one word as to a "precinct return," and to it the court was restricted in determining the facts as to which it was to declare the law. Therefore, no such fact was before the court. From the answer it would appear that the vote cast meant the vote stated on the face of the return. As a matter of course, in view of the previous opinion of the court, the State Board could not in any case add to or take from the votes named in the county return. By reference to the opinion as to the Clay county return, it will be seen that this is precisely what the court said as to the case stated. This statement of the law was entirely correct. It is true the court, in discussing the return from Clay county, uses the words, "statement of votes by precinct inspectors," but this by no means necessarily means a precinct return or a "certificate of the result" of an election at a precinct. Again, these words in the connection in which they are used in the opinion refer to the six votes deducted from the "votes cast" as well as to the 35 votes added to the votes cast, and there is certainly no

such thing known to the law as a precinct return of votes deducted from the vote cast at the precinct, or of votes added to the votes cast, and these were the additions and deductions made as alleged in the answer.

The criticism itself is based upon the hypothesis that it was the opinion of the court that the return from this county should not be counted. I am not aware that such ever was the opinion of the court, or that it was the opinion of any member of the court at the time the language referred to was written. I had not even seen any of the papers connected with the actions of the board. I might enter into the history of this portion of the opinion in the case of the State *ex rel.* Drew vs. The State Board, but this, as well as what has been said in the opinion of the court as to the Clay county returns, and what I have been constrained to say on account of the statement of facts and the criticism referred to, is, in my judgment, all unnecessary, all outside of this case.

Thinking as I do, for the reasons before stated, that the court in commanding the State Board to count the return from Madison county is directing them to state a falsehood, within the meaning of the statute, I cannot assent to such action.

The counsel for respondents having obtained leave, upon the overruling of the demurrer, to answer over, the Secretary of State (Wm. D. Bloxham) and Comptroller (Columbus Drew), filed an answer of the effect stated in the following opinion, delivered by the Chief Justice. The Attorney-General refused to join in this answer, but filed a separate statement. The certificate, annexed to this statement, is the same as that originally made by the Board of State Canvassers, in rejecting the Madison county returns. The statement, including the certificate, is as follows:

"The separate statement of George P. Raney, Attorney-General of the State of Florida, to the alternative writ of mandamus in this case shows:

"While it is true that the papers referred to in the answer submitted by the Honorable Comptroller and Secretary of State, were before the board and were urged by counsel for the Hon. Noble A. Hull, as containing grounds sufficient in law for rejecting the return from Madison county, my own reasons for assenting, that it should be announced as the conclusion of the board that such returns should be rejected, are those stated in the certificate hereto annexed, marked A.

"A."

MADISON COUNTY.

"The Supreme Court, in the case of Drew vs. the State Canvassing Board, in construing the section of the statute defining the powers and duties of this board, says: "The words, *'true vote'* indicate the votes *actually cast* as distinguished from the *legal vote.*" The Court again says that the clear effect of the clause, "if any such returns shall be shown or shall appear to be so irregular, false or fraudulent that the board shall be unable to determine the true vote for any such officer or member, they shall so certify, and shall not include such return in their determination and declaration, and the Secretary of State shall preserve and file in his office all such returns, together with such other documents and papers as may have been received by him or by said board of canvassers," is, "that a return of the character named shall not be included in the determination and declaration of the board, and that it has power to determine the *bona fide* character of the returns *dehors* their face." The expression *"bona fide* character" here used evidently refers to the words "irregular, false or fraudulent" used in the statute. It again says, in discussing the

article of the Constitution under which this section is authorized, "this is clearly an express authority for providing that returns of elections must be received, considered and passed upon by such officers and persons as might be designated by the Legislature, and the necessary conclusion is that such officers may be authorized by the Legislature to inquire into the truth or falsity of the returns sent to them, and if, upon such inquiry, they be satisfied that the *return does not show the vote actually cast at the election, but states a falsehood as to that,* they may lay it aside and refuse to count the return as is provided in the act of 1872." The power to lay a return aside and not include it in the determination under such circumstances, involves the duty to so lay it aside under the same circumstances. It is not denied that the return from Madison county does not include any of the votes actually cast at precinct No. 4 in this county; and it is the conclusion of the board that this return does not, therefore, show the entire or *true* vote *actually* cast at the election in this county. Although it is true that the county canvassers did canvass all the precinct returns which had been received at the clerk's or county judge's office up to the time of making the canvass, and although there is no irregularity in the action of the county board, yet this return does not state, in the opinion of this board, the *truth* as to the *actual vote cast,* but comes under the condemnation of the decision of the Supreme Court. This board, therefore, determined it to be its duty not to include this return in its determination and declaration, and certifies that such return is so false that the board is unable to determine from such return the true vote for any officer or member, cast in said county.

The relator demurred to the answer of the Comptroller and Secretary of State, on the ground that it did not state any defence in law to the writ.

The demurrer was argued by

H. Bisbee, Jr., in pro per.

J. F. McClellan and *D. S. Walker, Sr.,* for the Comptroller and Secretary of State.

THE CHIEF JUSTICE delivered the opinion of the court.

To the alternative writ of mandamus, the respondents, the Secretary of State and Comptroller, say that when the returns from Madison county were under consideration before the board, certain papers "herewith filed" were also before the board; that these papers, with the admission of both parties that the returns from precinct number 4 in Madison county were missing, constituted all the evidence before the board, upon the consideration of which they came to the conclusion that the returns from Madison county should be rejected. They further say that previous to the service of the writ in this case, having also rejected the returns from Brevard county, they found from the returns received from the other counties that Noble A. Hull had received a majority of the votes cast, and thereupon certified that fact to the Governor, who issued to said Hull the certificate of election required by law.

The Attorney-General does not join in the plea or answer, but says that the papers referred to in the answer of the Secretary and Comptroller were before the canvassing board, and that his own reasons for rejecting returns from the county of Madison were those stated in the annexed paper, (being the certificate of the board, a copy of which is appended to the original petition for the writ of mandamus.)

The relator demurs to the several answers as insufficient.

The plea or answer of the Secretary of State and the Comptroller contains on its face no averment that the returns

from Madison were so irregular or false that they could not determine the true vote of the county therefrom.

We have, therefore, examined the exhibits for the purpose of ascertaining whether they gave any sufficient reason for the refusal to canvass the Madison returns, treating them as a substantial part of the plea.

These papers are sundry protests of citizens, counsel and candidates against the canvassing of the returns for vigorous reasons; a notice by Mr. Bisbee of his intention to apply for a writ of mandamus; an affidavit of Judge Witherspoon giving his reasons for not signing a statement of facts as to the canvass in Madison; two copies of the returns of that county in due form, to one of which is attached a certificate signed by the clerk and a justice of the peace, who were members of the Board of County Canvassers, giving certain facts as to the condition of the returns canvassed by them, and which they detailed as follows: That in the returns from Madison District No. 1 the certificate was signed by only two of the inspectors, the other having refused to sign, by the advice of a citizen; that there were no returns from District No. 4; that from District No. 5 no oaths of inspectors or poll-lists were sent in, and the returns were brought in by one of the inspectors unsealed, and were enveloped and sealed up by him with an envelope furnished him by the clerk; that from District No. 6 the returns were brought in unsealed and the inspector sealed them in the clerk's office; and that from District No. 7 a certificate was given by the inspectors that there were ten more votes on the tally-sheet and in the box than there were names on the poll-list. They then certify that owing to the missing return they cannot give the true vote of the county, but that they had "counted all the returns that had come in, even with the irregularities, because we thought the law required us to do so."

Treating these papers and certificates as facts pleaded,

they show no reason why the precinct returns mentioned should not have been included in the county canvass, or why the county return should be omitted from the State canvass.

A certificate signed by a majority of the inspectors is a valid return. The omission of one to perform his duty is not even an irregularity in the return.

That no return came in from one precinct is not a reason for disfranchising the whole county, as we have determined upon the previous demurrer.

The absence from the clerk's office, or the omission to send to that office the oaths of inspectors or the poll-lists, may render the inspectors liable for a violation of duty, but the county board very properly performed their duties without them. They are no aid to the canvassers in ascertaining from the return the votes cast. We have so held on a previous occasion.

The law directing the inspectors to seal up the returns before sending them to the county board is directory only, and the omission to do so only affords opportunity for tampering with them if the inspectors place them in improper hands. If the county board found evidences of alteration, they might, and it would be their duty, to investigate the matter and cause the wrong doer to be punished. If they have no evidence of such forgery, they should count the return, even if it was never shrouded in a sealed wrapper.

The certificate of the inspectors of No. 7 that there were ten more votes on the tally-list and in the box than the names on the clerk's list, is far from being an allegation that votes not actually cast were counted, or that the canvass by the county board was irregular in any respect, or that it states a falsehood. Such certificate of the inspectors cannot be received by the county board to impeach the return.

The conduct of the county board of Madison, in disre-

garding irregularities which are not material and not affecting the result of the election, is deserving of commendation.

We are unable to find in the pleadings or papers submitted, any fact which impeaches in any degree the returns made by the canvassing board of that county, and therefore it is considered that the plea is not well founded.

As to that part of the plea which alleges that the canvassing board have, by refusing to count some county returns ascertained, and declared a result adverse to the relator, the very ground upon which he seeks this remedy, the question has been decided by this court on more than one occasion, and the plea held not to be a bar or ground for abatement of the writ.

The action of the Governor in the premises is not involved in this proceeding. The question here is, whether the relator is entitled to a legal counting of the votes cast and duly returned and a declaration of the fact, as required by law.

The relator must have judgment upon the demurrer.

Demurrer sustained.

MR. JUSTICE WESTCOTT, dissenting, delivered the following opinion:

This case is now before us upon the demurrer to the return of the respondents.

The respondents having plead over, after a ruling adverse to their demurrer to the alternative writ, by that act, in contemplation of law, withdrew their demurrer, and the record must be treated, for the purpose of determining this demurrer to the answer, as if the demurrer to the alternative writ had never been filed. This question, in cases other than mandamus, was elaborately discussed in the case of Johnson vs. The Pensacola and Perdido Railroad Com-

pany, (16 Fla., 623,) and the conclusion above stated reached. The same rule applies to the prerogative writ of mandamus. (2 N. Y., 490; 10, Wend. 26; 23 Wis., 427.) Under these circumstances, I can only repeat my views already expressed.

I think, for the reasons stated, that the demurrer of the relator should be overruled, with judgment for the respondents.

Judgment awarding the peremptory writ was rendered and the board convened and canvassed the returns, including that from Madison county, and made the certificate of election required by law and certified performance of the peremptory writ to the court.

DECISIONS

OF THE

Supreme Court of Florida,

JANUARY TERM, A. D. 1879.

THE STATE OF FLORIDA EX REL. H. BISBEE, JR., VS. GEO. F. DREW, GOVERNOR.

1. The courts have no power to control the action of the Governor in the discharge of any duty pertaining to his office under the laws of the State.

2. The issuing of a commission or a certificate of election, required by law to be issued by the Governor, though ministerial in its nature, is yet an executive act pertaining to his office as the Chief Magistrate of the State.

3. Each department of the government of the State is independent of the other in the performance of its own duty, and one cannot control the other in such performance without destroying this independence.

4. The person of the Governor is subject to the process of the courts only in reference to private acts, and acts not pertaining to executive functions imposed by the Constitution or laws.

5. In respect to his executive duties as Governor, he alone may judge of the manner in which he will perform them, and the judicial department may determine the effect of acts performed.

The alternative writ alleges that at a general election held on the 5th day of November, A. D. 1878, in the Second

Congressional District of Florida, for Representative to the 46th Congress of the United States, the relator was a candidate, and that on the 8th day of January, A. D. 1879, the Board of State Canvassers completed the canvass of the votes cast in said district, as shown by the election returns from the several counties, and determined and declared that the relator, Horatio Bisbee, Jr., had been duly elected Representative to such Congress, as appears from the certificate of the Board of State Canvassers on file in the office of the Secretary of State, made pursuant to the laws of the State. That the relator had applied to the Governor of the State to issue to him a certificate of election as Representative to the 46th Congress from such district, upon the canvass of such board, in accordance with the statute of Florida, requiring him to do so, but he had refused to issue it, as appears from a letter received from him and filed with the relator's petition. This letter from the Governor placed the refusal on the ground that he had already issued a certificate of election to another person (Noble A. Hull) and could not revoke it.

The Board of State Canvassers, in a canvass made prior to that referred to above, had rejected the Dade and Madison county returns, and declared Mr. Hull elected, and upon this action the Governor issued a certificate of election to Mr. Hull. After this the board reassembled, in pursuance of the decision of the court in the case of the State ex rel. Bisbee vs. Board State Canvassers, (17 Fla.,) and made a re-canvass, including the Madison return, and declared Mr. Bisbee elected.

The writ directed the Governor to issue the certificate to the relator, or show cause why he should not.

Section 30 of Chapter 1625, Laws of Florida, provides that "when any person shall be elected to the office of * * * Representative in Congress, the Governor shall make out, sign, and cause to be sealed with the seal

of the State, and transmit to such person a certificate of election."

The Governor appeared by counsel and moved to quash the writ, on the following grounds:

1st. The writ of mandamus does not lie against the Governor of this State to compel him to issue the certificate in question.

2d. This court has no power to issue such a writ against the Governor of Florida.

Geo. P. Raney for the motion.

Section 1, Article V., Const. of Florida; High on Extraordinary Remedies, §§ 118 to 123; People ex rel. Sutherland vs. Governor, 29 Mich.; 320; Mauran vs. Smith, Governor, 8 R. I., 192; State vs. Governor, 1 Dutcher, 331; State vs. Bartley, 39 Mo., 388; People vs. Yates, 40 Ill., 126; People vs. Bissell, 19 Ill., 229; Dennett, Petitioner, 32 Maine, 508; Hawkins vs. Governor, 1 Ark., 570; State vs. Warmouth, 22 La. An., 1; Appeal of John T. Hartranft, Governor of Pennsylvania, pamph., page 109; State vs. Low, 8 Ga., 360; Rice vs. Austin, 19 Minn., 103.

LeRoy D. Ball, contra.

36 Ala., 371, 380, 381; 7 Jones, N. C., 545; 25 Md., 173; 43 Md., 572; 5 Ohio State R., 528; 7 Ohio State R., 372; 39 Cal., 189; 4 Minn., 309; 14 Kansas, 416; 4 Nevada, 241; 51 How. Prac. Reports, 428-9-30; 12 Peters, 524; 1 Cr. R., 170; Moses on Mandamus, p. 82; High on Extraordinary Remedies, Sec. 120.

THE CHIEF JUSTICE delivered the opinion of the court.

The proposition of the petitioner is that the Judicial Department of the government may control the Executive in reference to an executive duty. He alleges that having

been duly certified to be elected to the Congress of the United States, and having presented to the Governor the legal evidence of his election, the Governor refuses to issue to him the executive certificate, under the great seal of the State, which the Legislature, by a long standing statute, has directed him to issue.

The statute is plain that this is a duty of the Governor, as much his duty, and as imperatively required, as any other executive act enjoined by law. The power of the Legislature to prescribe the time and manner in which certain duties shall be performed is unquestioned, and the issuing of certificates of election to persons who present the evidence of their election to Congress is required by the law of every State of the Union to be performed by the Governor.

The Governor replied to petitioner's application that he had already issued a certificate of election to another person, upon evidence previously presented to him, showing that such person was duly elected, and therefore declined to execute, under the seal of the State, a certificate to the petitioner.

While it is not considered that the issuing of a certificate of election to one person, which it may afterwards appear had been issued upon an erroneous or imperfect canvass of votes, has the legal effect to preclude or relieve the Governor from the duty of giving a certificate to one who shall appear to have a lawful right to it, nor that the giving of the latter certificate will cause any embarrassment to or show any inconsistency of action on the part of the Governor, the principal question presented by the petition has an overshadowing importance and must be determined upon other grounds.

The Executive, Legislative and Judicial Departments of the government are, by express provisions of the Constitu-

tion, each entirely independent of the other in their official action.

This is not a question whether the Governor, in exercising the functions of a trustee of an improvement fund, or an officer of a seminary, or of a board of charities, under the laws of the State, is or is not amenable to the process of this court, or of an inferior court, to control his action as much as such trustee or officer. But it is a question whether the Governor of the State in reference to an executive duty imposed by law, the performance of which is essential to the orderly conduct of the government, is subject to the control and direction of the Judicial Department; or, in other words, whether the Executive Department may be lawfully drawn under the guardianship of this department at the pleasure or in the discretion of this court. If this be so, the Governor, in reference to the time and manner of executing the laws, is also subject to the direction and control of each of the Judges of the Circuit Courts, who, by the Constitution of the State, have the same power as this court to issue and enforce the writ of mandamus.

It has ever been considered by statesmen and jurists that where one has power over another, in a public capacity, the one is the greater and the other the inferior power. (3 Shars. Black., 112.) Where the Governor accepts an office which he may be entitled to exercise *ex officio*, the latter is an inferior office, not necessarily connected with the Executive Department of the government. In this case he is liable to be controlled in his official action, not as the Governor, but as the inferior officer into whose action no executive function enters. In the present case the act required to be performed is not the act of such inferior officer, but it is the act of the Governor, as Governor, in his political executive capacity; not merely a discretionary act, it is true, but a duty required under the legitimate direc-

tion of the Legislature, a function of his office, for the neglect or violation of which he is answerable, if at all, to the constitutional power of the House of Assembly before the Senate in its judicial capacity.

In directing the Governor to put in exercise his executive power and duty, we should first assume that such power and duty belong to an officer or a department inferior to that of the courts.

If it be asserted that this duty is a ministerial act, and though it may be considered in some sense such an act, it is yet an act of executive authority and power, whether derived from the Constitution or the Statutes. The Constitution says: "he shall see that the laws are faithfully executed." The Legislature prescribes the laws which he shall execute. The law requiring him to grant a certificate of election is one of equal binding force as any other law prescribing executive duties, no more and no less. Many of such acts are perhaps properly designated as ministerial, yet they are none the less executive, emanating from the executive power, enjoined by law.

To assume that this court or the Circuit Courts may direct what acts he shall perform *as* the Governor of the State, under the laws of the State, or what acts he shall not perform, (for if he, in his capacity of Governor, is amenable to the process of the courts, he may be restrained from acting as well as commanded to act,) is to place the office of Governor in a position inferior to that of a judge of a court of record, and to absorb the power of the "Supreme Executive," the "the Chief Magistrate, who shall be styled the Governor of Florida." (Const. Art. V. Sec. 1.)

The Constitution has placed in the Governor the right "to require the opinion of the Justices of the Supreme Court as to the interpretation of any portion of this Constitution upon any question affecting his executive powers and duties, and the Justices shall render such opinion in

writing." (Art. V. Sec. 16.) This express provision may well be regarded, according to the common rules of interpreting laws, as fixing the boundary, if it was not before established in the nature of the case, beyond which the courts or judges shall not go in the direction of intermeddling with the duties of the Governor of the State. To employ the power of the courts in the business of managing the office of Governor and directing him in the exercise of executive duties, is to blot out the character given him in the Constitution of "Supreme Executive" and "Chief Magistrate" of the State, and reduced him to the level of a secretary or county clerk. If the courts have this power and command him to obey, we must have power also to imprison him for contempt, when he shall see fit to differ with the courts in reference to his duties and neglect to obey a writ which shall command obedience. Have the courts power thus to deprive the State of its head? If we have a case in which we cnanot punish the disobedience, it results that we had no power to command; the command is idle and nugatory; we can produce no result except the exposure of our own impotence.

The following cases are cited in support of the petition:

Tenn. and Coosa R. R. Co. vs. Moore, (36 Ala., 571.) This was an application of the petitioner, a corporation chartered by the Legislature, for a rule against the Governor to show cause why a peremptory mandamus should not be issued commanding him to draw his warrant on the Treasurer or Comptroller under an act of the Legislature for a portion of certain funds claimed by them, and accept a mortgage tendered under the act. The court held that the Governor was in that case the mere ministerial agent of the State in a transaction involving only private rights, and that he was amenable to the writ. There was no executive function involved.

The case of Marbury vs. Madison (1 Cr. 137,) was a man-

damus against the Secretary of State requiring the delivery of a commission which had been executed by the President and withheld by the Secretary. It was held that it was a proper case for mandamus. No executive act was involved.

The case of Kendall vs. The United States, (12 Peters, 524,) was a mandamus to compel the Postmaster-General to credit certain moneys upon an award under an act of Congress; a mere clerical act of the Postmaster-General.

The case of Cotton vs. Ellis, Governor, (7 Jones N. C., 545,) was an application by the Adjutant-General for a mandamus to require the Governor to issue a warrant for salary provided by law. A writ was directed to be issued, and the court remarks: "We do not enter upon the enquiry as to how the writ will be enforced, because we are not allowed to suppose that the question will arise, feeling assured that the sole purpose of the Governor is to obtain a judicial construction of the statute in question." The court relies for an authority upon the cases of Marbury vs. Madison and Kendall vs. The United States.

In Magruder vs. Swann, Governor, the Supreme Court of Maryland, (25 Md., 173,) the petitioner prayed a mandamus commanding the Governor to issue a commission to him as Circuit Judge. The court held that "the Governor of the State, like all other officers in the discharge of mere ministerial duties, is subject to the writ of mandamus, which cannot be denied to a suitor in such a case without acknowledging an authority higher than the law.

In Groome vs. Gwinn (43 Md., 572,) an order *pro forma* was entered by consent, that a writ of mandamus be issued directing the issuing of a commission to one who appeared be the election returns to be elected to the office of Attorney-General. By the Constitution of Maryland the Governor had jurisdiction to hear and determine the case of a contested decision for the office of Attorney-General, and a contest being made in this instance he had declined to issue

a commission until the contest should be finally settled, subject, however, to the opinion of the court as to his power, in the absence of legislation regulating it, to examine into the charges affecting the integrity of the election, which question he submitted to the court under this proceeding, and this was the only question presented for the judgment of the court.

In The State *ex rel.* Moffitt vs. Chase, Governor, (7 Ohio St. R., 372,) the court decides nothing as to this question, but dismissed the petition on other grounds.

In The State *ex rel.* Whiteman vs. Chase, Governor, (5 Ohio St. R., 528,) an application was made to the Governor to issue his proclamation, as required by the statute, setting forth that a certain banking company was duly authorized to commence and carry on the business of banking, all the provisions of the law having been complied with by the company, and the Governor had refused to comply with the law requiring him to issue such proclamation. The court granted the writ upon the argument drawn from the remark of Chief Justice Marshall in Marbury vs. Madison, that "it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus is to be determined." The thing required in this case affected only *private rights*, having no semblance of political action or affecting public political interests. The court further remarks: "The official act of the Governor in question in regard to issuing the proclamation asked for, is a duty prescribed by statute not necessarily connected with the Supreme Executive power of the State, ministerial in its nature, and a duty which might have been enjoined on some other officer." (The court might well have added that an act of the character referred to might have been as well imposed upon a president of a bank or any other person not a public officer.) The court adds: "With a clear

and accurate conception of his own duty, the Governor does not presume the exercise of a discretion, in regard to the question in this case, which would make his determination final and conclusive; on the contrary, he concedes the authority of the judiciary over the question."

In Harpending, vs. Haight, Governor, (39 Cal., 189,) the Supreme Court (by a majority of the judges,) granted a mandamus commanding the Governor to cause to be authenticated as a statute a certain bill in his possession which had passed both houses of the Legislature and was not returned to either house with his objections during its session just expired, whereby the bill by the Constitution had become a law, the Governor having prepared a veto message and sent it to the Legislature a few minutes after it had adjourned, which message and bill were returned by the Secretary of the Governor to the Executive office, where they remained. The Governor and the petitioner signed and filed a stipulation to present the case to the court, and agreed "that if the court are of the opinion that said bill did become a law, a peremptory mandate may issue commanding the respondents to cause said bill to be authenticated," as provided by a statute.

The Governor, however, filed an exception to the jurisdiction of the court, because "the functions of the Executive, in conjunction with the Legislature as part of the law-making power, are not the subject of mandamus." The court granted the writ upon the ground that the Governor had no official act to perform in the premises, and that like any other officer or person, he had merely the possession of a statute which belonged in the office of the Secretary of State, and the Governor had no longer any executive control of the act.

The Supreme Court of Minnesota (4 Minn., 309,) refused the writ against the Governor *to deliver* to the petitioner, as the asignee of the Minnesota and Pacific Railroad Com-

pany, twenty-five thousand dollars in Minnesota State railroad bonds, pursuant to an amendment to the Constitution. The court held that the act required to be done was purely ministerial, not necessarily pertaining to the duties of the Executive office if the duty was imposed by a statute, in which case, as the Governor was a mere agent created by the State to further private interests, he would be subject to the power of the court; but as the act was one imposed by the Constitution of the State, they did "not feel authorized to hold that it does not pertain to the office of the Chief Executive." We refrain from commenting upon this latter conclusion. The same court, (in 19 Minn.,) as we shall see, reverses the rule of this decision as to the power of the court to interfere with a decision of the Governor in respect to his duties.

The State vs. Osborn, Governor, (14 Kan., 416,) presents a case where the Governor refused to issue a patent for lands claimed under a purchase made under an act of the Legislature providing for the sale of certain lands, in which no executive or political feature was involved. This case has little bearing upon the question at bar.

The case from Nevada (4 Nev. 241,) was one involving only the question whether the relator had taken the proper steps to entitle him to a patent to public lands. "The proceeding was an amicable one, the Governor only hesitating to grant the patent because of a doubt in his mind as to whether those steps had been taken which would authorize him to sign and deliver the patent to the relator." The court decided merely that the petitioner was entitled to the patent, and granted the writ. It was a case of mere agency in the sale of lands.

We now proceed to examine the cases at hand which bear against the exercise of the power of this court over the authority and duty of the Governor.

The Supreme Court of Pennsylvania, in a recent case,

(the appeal of Hartranft, Governor, January, 1878,) says: "If we once begin to shift the Supreme Executive power "from him, upon whom the Constitution has conferred it, "to the Judiciary, we may as well to the work thoroughly, "and constitute the courts the absolute guardians and di- "rectors of all governmental functions whatever. We had "better, at the outstart, recognize the fact that the Ex- "ecutive Department is a co-ordinate branch of the "government, with power to judge what should or "should not be done within its own department, and "what of its own doings and communications should or "should not be kept secret, and that with it, in the exer- "cise of these constitutional powers, the courts have no "more right to interfere, than has the Executive, under "like conditions, to interfere with the courts. In the case of "Oliver vs. Warmouth, (22 La. Ann., 1,) it was held, that "under the division of powers as laid down in the Fed- "eral and State Constitutions, the Judiciary Department "has no jurisdiction over, or right to interfere with, the "independent action of the Chief Executive in the func- "tions of his office, even though the act he is required to "perform be purely ministerial. * * * * No case "could more forcibly exhibit the extreme reluctance of "courts to interfere with the functions of the Supreme Ex- "ecutive, for the hypothesis put is the refusal of the Gov- "ernor to perform a duty cast upon him by law, of a char- "acter strictly ministerial. We think, however, that the "grounds upon which this decision stands is substantial; "for, as the learned Justice well argues, the difficulty "arises in the attempt to establish a distinction between "ministerial and discretionary acts as applied to the Gov- "ernor, and then to conclude that the former may be en- "forced by judicial decree. It is objected, however, that the "doctrine is unsound in this, that it gives to the Judiciary "the large discretion of determining the character of all

"acts to be performed by the Chief Executive; this would "infringe his right to use his own discretion in determining "the very same question; that he must necessarily have the "unconditional power of deciding what acts his duties re- "quire him to perform, otherwise his functions are "trammeled, and the executive branch of the government "is made subject to the Judiciary."

This is the latest case reported upon this question.

In the case of The State vs. The Governor, (39 Mo., 388,) it is said that the issuing of a commission is clearly a political power. "But it is insisted that the granting of a "commission is a mere ministerial act; but does it follow "that it is therefore less an executive act? In one sense of "the term, as contradistinguished from judicial duties, all "executive duties may be said to be ministerial. We do "not consider that the duty of the executive becomes "ministerial because no discretion is left as to the manner of "its performance, and that in such case the court may in- "terfere to enforce performance."

The Supreme Court of Minnesota in Rice *et al.* vs. The Governor (19 Minn., 103,) in a case where an application was made for a mandamus against the Governor, commanding him to execute and deliver to the petitioner a deed of certain lands, under the provisions of certain acts of the Legislature, holds that neither of the departments of the government is responsible to the other for the performance of its duties, so neither can enforce the performance of the duties of the other. And admitting for the sake of argument that the duty in the case is purely ministerial, the court saw no good reason for the distinction thus drawn between ministerial and other duties. The Constitutional provisions making the departments distinct and independent, are broad and general and recognize no such distinction. This decision reverses the rule adopted in 4th Minn., 309, elsewhere referred to.

In (8 Ga. R., 360,) The State vs. Towns, Governor, it it is held that however clear it may be as a general legal proposition, that when a mere ministerial act is required to be performed by law on the part of an executive officer, and individual rights depend on the performance of that act, the proper tribunals of the country have jurisdiction to compel its performance; yet for political reasons alone, the Chief Magistrate of the State cannot be compelled by mandamus to perform such ministerial act. That was upon an application for a mandamus to compel the Governor to commission one claiming to have been elected clerk of a court. The same court (7 Geo., 473, 483,) intimated that the writ ought, in such case, to issue.

In The State vs. Warmouth, (22 La. Ann. R. 1,) an application for a mandamus to compel the Governor to issue certain bonds of the State, authorized and required by law to be issued by the Governor in payment for certain improvements, the court denied the writ, remarking that it thinks the doctrine that a distinction is to be taken between acts purely and simply ministerial, and acts which the Governor has a discretion to perform or not, is objectionable in this, that it accords to the Judiciary the large discretion of determining the character of all acts to be performed by the chief executive officer as being ministerial or otherwise. This would infringe the right of the Executive to use discretion in determining the same question. He must be presumed to have this discretion, and the right of deciding what acts his duties require him to perform, otherwise his functions would be trammeled, and the executive branch of the government made subservient, in an important feature, to the judiciary.

In Dennett, petitioner, (32 Minn., 508,) a mandamus was refused to be issued directing the Governor and council to declare the petitioner elected to an office and give him a certificate, and says: "That department is responsible for the

correct performance of its duties in the manner prescribed by the Constitution, but is not responsible to the Judicial Department. The argument that it cannot properly be regarded as an official duty of the Executive Department, because its performance might by law have been intrusted to other persons, is not regarded as sound. It does not follow that an act cannot be the official act of a department of the government because other persons might lawfully have performed the same acts, if performance had been by law intrusted to them."

In Hawkins vs. The Governor, (1 Ark., 570,) the court, by similar reasoning, held that it could not grant a mandamus to compel the Governor to issue a commission to petitioner as Commissioner of Public Buildings, to which he was elected by the Legislature.

In The People vs. Bissell, Governor, (19 Ill., 229,) a mandamus was prayed to compel the Governor to issue certain bonds under an act of the Legislature. It was held that the court had no control over the Governor to compel him to perform any public duty pertaining to his office, and "remitted him to the high tribunal of his own conscience."

In The People vs. Yates, Governor, (40 Ill., 126,) it was held that the writ of mandamus would not lie against the Governor of the State, to compel him to deposit in the office of the Secretary of State a bill which had passed the General Assembly and been placed in the hands of the Governor for his consideration, and which, it is alleged, had not been returned to the proper house within the time limited by the Constitution with his objections. (This is directly in conflict with the case in 39 Cal., elsewhere referred to.)

It was held in State vs. Fletcher, Governor, (39 Mo., 388,) that the Supreme Court had no jurisdiction to issue a writ of mandamus to the Governor of the State to compel him to issue a commission to an officer, this duty of the Governor being political and not merely ministerial, and

the court remarks that if the court have power to prescribe the rule of his conduct in one case they have in the other. This would make the judges the interpreters of the will of the executive, and the independence of the executive department as a co-ordinate branch of the government would virtually be destroyed.

The same question was before the Supreme Court of New Jersey in the State vs. The Governor, (1 Dutcher, 331,) and the court held that it had no power to issue a mandamus to the Governor, either to compel the excution of any duty enjoined on the executive by the Constitution, or to direct the manner of its performance. "If by ministerial duties are meant duties performed by one acting under superior authority, or not with unlimited control, none of the duties of the executive are ministerial."

Upon this point the Supreme Court of Rhode Island, in Mauran vs. Smith, (8 R. I., 192,) remarks that if it be true that the Governor may be controlled "to the extent of his ministerial duties, the executive is not the co-ordinate of the judiciary, but subordinate to it, and the line of separation between the two departments is, to that extent, obliterated."

The case of the People vs. The Governor, (29 Mich., 320,) goes quite as far as any that have been found among the reports. The conclusion of the court is that where a duty is devolved upon the chief executive of the State, rather than upon an inferior officer, it will be presumed to have been done because his superior judgment, discretion and sense of responsibility were confided in for a more accurate, faithful and discreet performance than could be relied on if the duty were upon an officer chosen for inferior duties: and such a duty can seldom be considered as ministerial. And this whether the duty is imposed by the Constitution or by a statute.

Judge Cooley, in delivering the opinion of the court in that

case, remarks: "When duties are imposed upon the Governor, whatever be their grade, importance or nature, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a Secretary of State, or a sheriff of a county, or other inferior officer, and that inasmuch as in case it had been so imposed, there would have been a judicial remedy for neglect to perform it, therefore there must be the like remedy when the Governor himself is guilty of a similar neglect.

"The apportionment of power, authority and duty to the Governor is made either by the people in the Constitution, or by the Legislature in making laws under it, and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the Governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior officer, and consequently, for the purpose of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the Constitution or the law, but also to assert a right to make the Governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something, at least, of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government."

Our conclusion in the present case, upon principle and upon authority, is that the Governor of the State of Florida cannot be commanded by the courts to perform any act which may be required of him by a law of the State relat-

ing to the executive office, or any duty which he may be required to perform of a political nature, even though private rights may be involved. It is not necessary to say that this rule does not extend to a duty or office conferred upon the governor *ex-officio*, as that of a mere trustee of a fund or property, or a director or corporator in the execution of a franchise or other private duty which might have been as well imposed upon any other person, and which office is conferred upon the person occupying the office of Governor, for the purpose of securing the unbroken occupancy of such inferior office or franchise.

In the case referred to from 25 Maryland, 173, before cited, the writ of mandamus was awarded against the Governor, on the ground that it could not be denied in that case "without acknowledging *an authority higher than the law.*"

I can find no better language with which to confront this terse apothegm than that found in the opinion of presiding Judge Knott, in Grier vs. Taylor, Governor, in 1827, (4 McCord, S. C., 210.) "Neither department," he says, "can control the other in the exercise of its legitimate functions. To the judges belongs the power of expounding the laws; and although in the discharge of that duty they may render a law inoperative by declaring it unconstitutional, it does not arise from any supremacy which the judiciary possesses over the Legislature, BUT FROM THE SUPREMACY OF THE CONSTITUTION OVER BOTH."

The argument that the writ of the court cannot be enforced against the Governor is, that as commander-in-chief of the physical forces of the State, he would not aid the court, but would probably resist it in any attempt to coerce the executive power into subjection to another department. "The sentence of the court in such case would be contemptible." (1 Shars. Black. Com., 242.)

The petitioner suggests that this would be equally appli-

cable if the Governor was charged with the perpetration of a crime, and he should resist the process of the courts by means of the military forces of which he was the head. We do not recognize the applicability of the case. It is not a case of personal immunity from arrest for a breach of the criminal laws, and we cannot anticipate the case of a personal resistance or rebellion by the Governor against the State, and against the ordinary enforcement of the laws and the recognized process of the courts. The question now here is whether this court will control the action of the Governor in respect to a political duty of his office, and this we refuse to do.

The writ of mandamus is refused.

MR. JUSTICE WESTCOTT, dissenting, delivered the following opinion:

I cannot agree with the view of a majority of the court, that in this case we have no power under the Constitution to issue the writ of mandamus. This court has held that officers of the executive department of the government are subject to control by the courts in the exercise of ministerial powers pertaining to elections. All the discretions, if there be any, in reference to ascertaining the actual votes cast throughout the State at a general election in this State, are executive in their character, in so far as the fact that they are exercised exclusively by officers of the executive department of the government renders them executive. The Comptroller, the Secretary of State, and Attorney-General constitute the Board of State Canvassers of elections. In the case of the State *ex rel.* Drew vs. The Board of State Canvassers, (16 Fla., 1,) these executive officers were thus controlled. So in the case of the State *ex rel.* Bloxham vs. The Board, (13 Fla., 55,) they were thus controlled, and in the very matter now before this court, a majority of this court

directed the Board of State Canvassers to count a return of an election in Madison county, which the board thought false within the meaning of the statute defining their powers, but which the court held to be such as should be counted. (The State *ex rel.* Bisbee vs. The Board of State Canvassers, 17 Fla.) These acts which we have thus controlled are not only executive in their character, but, in addition thereto, they are executive duties imposed by law, the performance of which is eminently essential to the orderly conduct of the government. They are not *ex-officio* acts of trustees of funds or private eleemosynary institutions.

The executive acts which we controlled in the case of the State *ex rel.* Drew vs. The Board of State Canvassers, (16 Fla., 1,) were acts which, when exercised, conferred a *prima facie right to the office of Governor itself,* in which act, too, a consideration of the exercise of the elective franchise, by all the qualified voters of the State, was involved. Certainly there is no more important ministerial executive act than that. Nor have I ever doubted the power to thus control ministerial executive acts of this character. They involve no political or other discretions, and the fact that the party to be controlled is an executive officer, or that he belongs to another department of the government, does not and has not, with this court, controlled its action. Up to this time I conceive that I have followed the well-considered statement of the law upon the general subject, as it was announced by Chief Justice Marshall in the early days of the republic, which is that *"it is not by the office of the person to whom the writ is directed, but the nature of the thing required to be done that the propriety or impropriety of issuing a mandamus is to be determined."* 1 Cranch, 171.

What is the act here to be performed? It is simply the making out and signing a certificate of election by an executive officer. This act is based upon a statement of majorities made by the Board of State Canvassers, with the

making of which the Governor under the law has nothing to do. It is a simple and pure ministerial act of an executive officer, in its essence and nature no more discretionary or political than the act of the Secretary of State in certifying to the election of a member of the Legislature. It is an act which the Legislature might have devolved upon the Secretary of State or any other subordinate executive officer. Indeed, in the preceding section of the very law which makes it the duty of the Governor to sign this certificate as to the election of a Representative in Congress, the duty to issue a like certificate to all State Officers elected, as shown by the canvass and count of the Board of State Canvassers, is imposed upon the Secretary of State.

The act being thus a purely ministerial act of an executive officer, it is, in my judgment, just such an act as we have controlled in the past by mandamus. In speaking of the nature of the act of a Board of State Canvassers when they are required by law to make a certificate of a character essentially like that which the law requires at the hands of this executive officer here, we said in the case of the State *ex rel.* Drew vs. The Board of State Canvassers, (16 Fla., 44,) that with the exception of the courts of Louisiana, and perhaps another State, no sanction could be found for the view that such an act could not be controlled by mandamus. The true doctrine upon this question, when we reason from general principles well established by abundant precedent in England and the United States, is that where the act sought to be controlled is a ministerial act, as contra-distinguished from one involving a discretion, and upon its exercise depends a right of the citizen to enforce which there is no other remedy, then the writ of mandamus lies. This is the doctrine as applicable to executive ministerial acts as distinguished from acts political or involving discretion, as announced by Chief Justice Marshall in the Marbury case. In stating the conclusion of the court

in that case he says, that as to "acts in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that these acts can be only politically examinable;" but he says, "when a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy." In this case also Chief Justice Marshall remarks: "The province of the court is solely to decide on the rights of individuals, not to inquire how the executive or executive officers perform duties in which they have discretion; questions in their nature political, or which are by the Constitution and laws submitted to the executive, can never be made in this court." Here we have an accurate and clear statement of what constitutes a political or discretionary act, as distinct from one involving nothing beyond a ministerial function.

Having thus ascertained the principle of law applicable to executive ministerial acts, I have, in my judgment, no more to do in this case than I would in any other case involving a question of title to land or other ordinary action at law, and that is to apply the principle to the case. I have simply to say that the Governor is an executive officer; he has failed to perform a purely ministerial duty; the relator's right is thereby violated, he is entitled to this remedy; it is my duty to give it to him, and independent of and without reference to the extent of the physical power under the control of the respondent, or of such forces as he may induce to co-operate with him in resistance, a thing which, in my judgment, has nothing to do with the question, I shall award the writ.

As an answer to what I have written, it may be said that the act of the *Governor* is here sought to be controlled, and in the cases from which I deduce my principle, it was [redacted] act of the head of an executive department or bureau

of the Federal Government, and of the Secretary of State, Comptroller, and Attorney-General of a State. I admit the difference and at the same time I do not hesitate to say that according to the plainest rules of construction, according to the clear letter of the Constitution of this State, it is a difference without a distinction here. The difference is in nothing but in the degree of the office. One is a higher office than the other, but both are executive—the act to be done being in its nature essentially the same.

If it be true as a general principle that executive officers may be controlled in ministerial acts, I enquire whether, under the Constitution, this simple difference in degree renders the ministerial acts of one not the subject of judicial control, while the same act of the other is.

The only clause of the Constitution which has any bearing upon this question is Article III. This article, in general terms, distributes the power of government. It provides that "the powers of the government of the State of Florida shall be divided into three departments, Legislative, Executive and Judicial, and no person properly belonging to one of the departments shall exercise any functions appertaining to either of the others, except in those cases expressly provided for by this Constitution."

There is no doubt that, under this distribution of power, there is nothing which elevates the Governor over any other executive officer. The limit as to the power and function belonging to an executive officer is not because he is one officer or another; not because he is the Secretary of State or Governor, but because the power or function to be exercised belongs to the *Executive Department* of the government.

In directing a ministerial act to be performed, we are discharging a judicial function; so, likewise, in a case involving individual right, we have authority and power to determine the right of an individual, and if it depends

upon the performance of a ministerial function by an executive officer, we may direct its performance by him. This is the law to which all executive officers owe obedience, and, under the Constitution, the Governor is not above and beyond the law. I do not see any ground for making this officer an exception.

Much is said in the cases upon this subject, as to the different departments of the government revolving in their own spheres; the necessity for harmonious administration of the power of government, &c. These are phases from which elegantly-rounded periods may be prettily constructed, apothegms which add interest to dry legal essays. They are destitute, however, of anything akin to a logical syllogism; are wanting in legal accuracy; tend only to confuse, and are the means ready at hand under which too often the sacred right of a citizen is liable to be forgotten.

I cannot see that the Governor is above the law. As remarked by Chief Justice Marshall, "the very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of the government is to afford that protection. In Great Britain the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."

When a mandamus goes to an executive officer to control his action, this court acts strictly within its recognized sphere of action, and for that reason, in such a case, I can see no ground for complaint or conflict. We act within our sphere of action when we pronounce an act of the Legislature unconstitutional, and whenever a private right is involved, it is our function and duty to review the action of the Legislature to determine *the meaning of the Constitution, that being involved in fixing the individual right,* and to act upon our own judgment in the premises.

The Legislature may provide rules of practice for us, and

we must comply with them so long as they are of a nature admitted to be within the power of the Legislature. This is a function of that department of the government. It is said that the power cannot exist in the courts, because the right to determine what is a ministerial act involves the power to determine that acts resting in discretion are ministerial, and hence the court may, under such a principle, usurp control of all the power of government. I see nothing in this; the same thing may be said of all judicial powers. The power to finally decide the right in a contest between individuals involves the power to decide wrong as well as right, and yet it is no answer to a claim of such general power. And if it be true that the Governor is in all cases the final judge of his own powers, and the Judiciary are tied by his simple declaration in a given case that he is discharging an executive function, why cannot he hear causes and enter judgments in ordinary actions under a claim that power of this character is executive?

It is now, and has been since the time of Lord Mansfield, a function of the courts, when a matter of private right is involved, to control ministerial acts of executive officers. It is in such a case a judicial function to determine what is a ministerial act, and if the act be that of the Governor, the Constitution makes no difference as to it. But it is said we cannot enforce our writ. As to this I simply state a self-evident proposition. Whether a court has adequate physical power to enforce any process, is not the method by which to determine its jurisdiction to issue it. The question of adequate power depends upon the amount and nature of the resisting power, and the degree of power which the court can bring to bear in the contest, neither of which matters determines the extent of the legal jurisdiction of any tribunal, whether it be one executive, legislative or judicial in its character. An apprehension of such a collission, however, would be no excuse for my non-performance

of what I conceive to be a plain duty upon which depended the enforcement of the right of a citizen.

As to the cases upon the subject, there are different decisions in Missouri, Minnesota and Georgia. The courts of Arkansas, Rhode Island, Illinois and Louisiana are against the jurisdiction. The courts of Alabama, North Carolina, Maryland, Ohio and California assert the power. What Judge Cooley says (29 Mich., 320,) is mere dictum. The court there held the act in question to be "not one of a pure ministerial character where he is left to no discretion." There was no ministerial act in the case. The case in 1 Dutcher, 343, was a case in which "the applicant, upon the facts disclosed, was not entitled to the relief sought for." The court was "asked to direct a commission to issue in direct conflict with the act."

The case in Pennsylvania, which I have not seen, seems to concern some communications which, under the general principles of law, are privileged.

Whether the fact that the Governor having issued a prior certificate, under the circumstances of this case, is a sufficient answer to the writ, is a question as to which I do not think it is necessary for me to express an opinion. I will say, however, that there is, in my judgment, a manifest difference between his failure to issue a second certificate upon a new statement made by this board, and a failure of the board itself to make a full legal canvass of returns before it, which was the case in the State *ex rel.* Bloxham vs. Secretary of State *et al.* (13 Fla., 55,) and as in The State *ex rel.* Drew vs. State Board, (16 Fla., 1.)

THOMAS SHERLOCK, PETITIONER, VS. THE MAYOR AND CITY OF JACKSONVILLE, RESPONDENTS.

1. A prohibition will not be granted to a Mayor's Court when it appears that the matter complained of has passed from the jurisdiction of that court by appeal to the Circuit Court.

2. The jurisdiction of the Supreme Court to entertain proceedings in prohibition, as conferred by the Constitution of this State, is confined to the legitimate office of that writ, as defined by the common law, and a statute enlarging and changing the purposes of the writ, so as to confer a new and original jurisdiction of matters not contemplated by the Constitution, will not be recognized by this court as affecting its jurisdiction.

3. A prohibition will only be granted by the Supreme Court to control the action of tribunals or persons exercising judicial power who attempt to usurp a jurisdiction belonging to some other forum.

The facts of the case are stated in the opinion of the court.

E. M. Thompson for Petitioner.

E. M. Cheney for Respondents.

THE CHIEF JUSTICE delivered the opinion of the court.

Thomas Sherlock files his suggestion by petition for a writ of prohibition against the respondents, and alleges that in July, 1878, he was "engaged in the regular business and occupation of keeping a keno table in said city;" that in April, 1878, he obtained from the proper State and county officers a license to keep a keno table within and throughout the county of Duval, and paid the amounts therefor required by law, for the period of one year; that he also tendered the amount required by law to the city and demanded a license for said business from the city, which license was refused. In July, 1878, petitioner was

arrested by the city marshal and taken before the mayor, upon a warrant issued by him, charged on oath with keeping a disorderly house, to-wit: a place where a certain gambling game, known as keno, was allowed to be played, and was played by divers persons with certain cards and instruments, for the chance of winning or losing money, contrary to the ordinances of said city. That he pleaded not guilty to said charge; that the mayor held him to trial, and tried him on said charge without a jury, and after hearing testimony of witnesses, found petitioner guilty, and sentenced him to pay a fine of one hundred dollars and costs, and that he remain in custody until the same should be paid; that petitioner then appealed to the Circuit Court of Duval county, where said cause is still pending on appeal. He further alleges that it is the intention of the mayor and other officers of the city to prosecute him for such pretended violation of the ordinances of the city, and to subject him to fine, costs and imprisonment, &c. That the ordinances of said city declare that every place where gaming of any kind with cards or the game called keno is allowed to be played for winning money is a disorderly house, and any person convicted of keeping such disorderly house shall be punished by fine not exceeding two hundred and fifty dollars, or by imprisonment. He then describes the game, and says that it is played in an orderly, peaceful and quiet manner, and his house is not a disorderly house.

Petitioner therefore prays that a writ of prohibition may be issued prohibiting the mayor and the city, and their officers and employees, from taking any further proceedings in the prosecution of the case, either before the Mayor's Court or before the Circuit Court, and from collecting any fine or enforcing any imprisonment on account of the premises, and also from attempting to molest him in the conducting of his said business during the term of his license, by any prosecution for such alleged offence. A

copy of the record of the Mayor's Court is annexed to the petition.

Upon a rule to show cause, the respondents appeared and filed a demurrer to the matters alleged by the petitioner in his suggestion, on the following grounds:

1. That it does not appear by the suggestion that the mayor or the city has exceeded its jurisdiction in adopting or attempting to enforce the ordinance.

2. Because no prosecution is pending before the said mayor, nor is the city now proceeding, or about to proceed, in the said cause.

3. Because it does not appear that the mayor or the city is attempting to collect the fine, or otherwise in an unlawful manner to harass the petitioner.

4. Because the petitioner has an appropriate remedy at law by the ordinary forms of proceeding.

5. Because the payment of a license tax to the State does not give him a right to keep and use a keno table, contrary to the law of the State or the ordinances of the city.

6 Because the ordinance of the city, prohibiting the keeping of such disorderly house as is described, is not in conflict with the law of the State.

The petitioner joins in demurrer.

The first four grounds of demurrer present the question, whether this court has power under the Constitution and laws to grant the writ of prohibition prayed?

The writ of prohibition is a writ of the common law, originally issuing only out of the court of King's Bench, a prerogative writ, but afterwards was sometimes issued out of the court of Chancery, Common Pleas, or Exchequer, directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that juris-

diction, but to some other. (3 Bl. Comm., 112.) This is the elementary definition of the office of the writ.

Chief Justice Savage, (in The People vs. Works, 7 Wend., 487,) says: "It is the remedy provided by the common law against the encroachment of jurisdiction, to keep inferior courts and tribunals within the limits and bounds prescribed to them. The reason of prohibitions in general is that they preserve the rights of courts and of individuals."

The Constitution of this State expressly gives the Supreme Court jurisdiction to issue this writ. It does not, in terms, attempt to define or direct the purposes for which the writ may be used or applied. The definition and purposes of the writ must be sought for in the archives of the common law, to which it owes its origin. Its purposes, therefore, are to preserve the rights of courts and individuals from the unlawful encroachment of inferior courts upon the jurisdiction of some other court or tribunal, and to keep them within their own spheres.

When, therefore, an inferior court assumes to exercise a power which is beyond its jurisdiction, or to proceed in a manner not warranted by law, this writ may be resorted to for redress to prohibit the threatened intrusion.

If the act complained of be already done, it is manifest that this writ cannot undo it, for that would require an affirmative act. (U. S. vs. Hoffman, 4 Wallace, 158.)

It is held, in reference to the power to issue this writ, that it does not issue for the redress of grievances which may be had in the ordinary course of judicial proceedings, by appeal or writ of error.

Nor will the suggestion that there are or may be other suits of the same nature pending against the relator in the same court avail to procure the writ, since the court will not issue a prohibition in a case not pending for the sole purpose of establishing a principle to govern other cases.

(High on Ex. Remedies, Sec. 766; U. S. vs. Hoffman, 4 Wallace, 158.)

Mr. Justice Cowen, in *ex parte* Brandlacht, (2 Hill, N. Y., 367,) says, "the office of prohibition is to prevent courts from going beyond their jurisdiction in the exercise of judicial, not ministerial power. Otherwise we might be called on to send the writ whenever a justice of the peace was about to issue civil or even criminal process irregularly."

It is a principal of universal application, and one which lies at the very foundation of the law of prohibition, that the jurisdiction is strictly confined to cases where no other remedy exists, and it is always a sufficient reason for withholding the writ that the party aggrieved has another and complete remedy at law. (High on Ex. Rem., Sec. 770, and authorities cited.) And the writ will not be allowed to take the place of an appeal. In all cases, therefore, where the party has ample remedy by appeal from the order or judgment of the inferior court, prohibition will not lie, no such pressing necessity appearing in such cases as to warrant the interposition of this extraordinary remedy, and the writ not being one of absolute right, but resting largely in the sound discretion of the court.

Thus, where the defendant in an action instituted in an inferior court pleads to the jurisdiction of the court and his plea is overruled, no sufficient cause is presented for granting a prohibition, since ample remedy may be had by an appeal from the final judgment in the case. (*Ib.* Sec. 771, and notes.)

It cannot take the place of a writ of error, which proceeds upon the ground of error in the exercise of a jurisdiction which is conceded.

The jurisdiction of the Mayor's Court to hear and determine complaints of infraction of city ordinances is not questioned, though the validity of the ordinance in question is denied, and it is claimed that the Mayor's Court had

not jurisdiction of the offence charged, upon two grounds; one of which is, that having a license from the State and county to keep a keno table, and having tendered the license fee to the city, which it refused, he is not amenable to the charge of keeping a disorderly house by keeping a place where the game of keno is played by persons frequenting the place for the purpose of winning money. The other ground is, that the offence, if it be an offence, is punishable under the criminal laws of the State by the courts of the State, and not by the municipal courts.

As to the first of these positions, the matters alleged are matters of fact and of law, claimed to grow out of the facts alleged by way of defense; and as to the second, the Mayor's Court, according to the suggestion, decided in favor of his jurisdiction, and these questions and matters are not now pending before that court, but the whole case is before the Circuit Court, which is authorized by the Constitution to determine all questions involved in it upon the appeal, and that court has not acted in the matter, nor is the writ prayed as against the jurisdiction of the Circuit Court to act upon it. The jurisdiction of the latter court to entertain the appeal has not been questioned. The presumption is that the Circuit Court will reverse the judgment of the Mayor's Court and remand the cause with directions to dismiss it if no offence is charged, or if the latter had not jurisdiction; or affirm it if it had jurisdiction and the complaint shows an offence against a valid ordinance, that the testimony if sent up on the appeal sustains the charge, and that the proceedings were had in conformity with the law.

The suggestion filed, however, goes further, and prays the writ to prohibit the city and its officers and employees from taking any further proceedings in the case before the Mayor's Court or the Circuit Court.

The right to prohibit other than judicial tribunals by

means of writs of prohibition, is claimed under the 8th section of an act to amend an act regulating the practice in writs of prohibition, approved February 10, 1877, which provides, "that a writ of prohibition shall extend to and apply to all corporate, municipal, quasi-judicial, county, ministerial and all other boards, or bodies, or offices, or any of them undertaking or professing to exercise any power or franchise under the laws of this State, in all cases where such board, body or officer, or any person by their appointment or authority, may be doing or about to do any unlawful act or thing which may in any wise injuriously affect the interests or rights of any person or persons applying for said writ."

The suggestion is that under this section, this court may issue a prohibition to prevent the officers or agents of the city applying to the Mayor's Court, or the Circuit Court, to obtain a decision or judgment upon the matter referred to.

Although the power of the Legislature thus to enlarge the jurisdiction of this court, and to change so radically the character and office of the writ, was not called in question upon the argument, we are not prepared to admit such power so far at least as this court is concerned. The statute in question so entirely changes the nature of the writ that it is no longer a mere prohibition, but becomes perverted into a writ of injunction, or a *quo warranto,* or even a substitute for an action of replevin, instead of a proceeding to keep subordinate judicial tribunals within the bounds of prescribed jurisdiction. We cannot regard the section referred to as applicable to proceedings in this court at least.

A prohibition may go against a court or any tribunal properly exercising public, judicial functions *and* the parties engaged in such proceedings, but not against private parties alone, or against public or private corporations or their officers. It is true that there may be found in the re-

ports two or three cases in which a prohibition has gone to restrain a tax collector from enforcing an illegal tax, but these cases have been promptly and strongly condemned. (See 7 Wend., 486; 1 McMullen, S. C., 410; 1 Hill, N. Y., 195; 17 Miss., 623.)

As the cause is not pending in the Mayor's Court of the city, there is nothing upon which a prohibition can operate, and there is therefore no occasion to examine any other question.

It is thereupon considered and adjudged by the court that the suggestion of the petitioner is not sufficient in law, and a prohibition thereon is refused.

(MR. JUSTICE WESTCOTT took no part in the hearing or consideration of this case.)

HUGH BELLAS, PLAINTIFF IN ERROR, VS. JOSEPH C. KEYSER.

1. A paper in tne following words: "I hold for account of ship Kalliope the sum of one hundred and eighty-three dollars and twenty cents for towage to sea of said ship," signed H. B., which was delivered to the Master of said ship, and by him endorsed to K. who towed the ship to sea, is not in its terms a "writing whereby money is promised or secured to be paid," and does not come wthin the meaning of the act of November 23, 1828, (Thomp. Dig., 348.)

2. Such a writing is a mere memorandum upon which assumpsit will not lie unless extrinsic facts are averred and proved not inconsistent with the terms of the writing, but explaining and rendering it intelligible and capable of enforcement as a contract or promise to pay money.

Writ of error to the Circuit Court for Escambia county.

The facts of the case are stated in the opinion of the court.

G. A. Stanley for Plaintiff in Error.

The demurrer should have been overruled, because the holder of said writing acquired no rights which entitled him to notice.

It is non-negotiable by the commercial law,, and the holder has only the rights of an assignee.

It is a well settled principle of commercial law that the assignee of a non-negotiable instrument takes it with all the equities arising out of the transaction with which it is connected, and holds it with the same rights as the assignor. (Winchester vs. Hackley, 2 Cranch, 342; 16 Fla., 738; Murray vs. Sylborn, 2 John. Ch., 441; Jack vs. Davis, 29 Ga., 219; Ayres vs. Milroy, 53 Mo., 576.)

The assignee acquires the rights of the assignor and stands in his position. (Thompson vs. Allen, 12 Ind., 559; Smith vs. Rogers, 14 Ind., 224; Bush vs. Lathrop, 22 N. Y., 535; Andrews vs. McCay, 8 Ala., 930; Wright cs. Levy, 12 Cal., 257.)

The writing is non-negotiable and incapable of being transferred so as to enable a holder to sue in his own name, unless it be considered as one of the instruments mentioned in the 28th section of the act of 1828, entitled an act to regulate judicial proceedings.

The 34th section of said act authorizes the endorsement of any of the instruments mentioned in the preceding section, and suits in the name of assignee with same rights, powers and capacities as might have been possessed by the assignor. The effect is simply to enable the assignor to pass the legal title, when, before the enactment of the statute, he could only pass an equitable title.

It was not the intention of the framer of this statute to change the rule of commercial law as applicable to such instruments, except in two particulars; in shifting the burden of proof, and in allowing writs in the name of the as-

signee, leaving the rights of the holder in all other respects to be governed by the general commercial law. (Cotten vs. Williams, 1 Fla., 34; Sinclair vs. Gray, 9 Fla., 74; Kendig vs. Giles, 9 Fla., 278; Bradford vs. Williams, 4 How., 576.)

The transferee of a non-negotiable instrument holds as assignee and not as endorser. (Auck vs. Colston, 7 Grattan, 195.)

The instrument may be by statute assignable, but that does not entitle it to the privilege of commercial paper. (King vs. Vance, 46 Ind., 246; Pratler vs. Weisenger, 10 Bush, Ky., 117; Easton vs. Hyde, 43 Minn., 90; Butler vs. N. Y & E. R. R. Co., 22 N. Y. 197; Marsh vs. Oneida, &c., Bank, 34 Barb., 278.)

The assignor made a contract with defendant for the towage of the ship Kalliope; the defendant is ready to fulfill the contract, but is prevented from doing so by the action of the assignor. Under these circumstances he could not maintain an action to recover back the money deposited in consideration of the contract.

The declaration is defective in substance. It discloses no privity of contract between plaintiff and defendant.

The declaration fails to show any acceptance or promise to pay by him.

The order might, as between both parties, be considered an equitable assignment of the fund, but suit must be brought in the name of the assignor. (Mandeville vs. Welsh, 5 Wheat., 277; Wiggins vs. McDonald, 18 Cal., 126; Howard vs. Tucker, 18 Ill., 543.)

The instrument sued on is not assignable under the statute of 1828, so as to enable the assignee to sue in his own name.

It is not a promissory note, nor is it a writing whereby money is promised to be paid. It contains no promise to pay, but is simply a memorandum made as evidence of a

contract. (Smith vs. Allen, 5 Day, 337; Kendig vs. Giles, 9 Fla., 278; Courrier vs. Lockwood, 40 Conn., 90.)

The writing amounts simply to an acknowledgement of the receipt of the amount on account of ship. A certificate of deposit containing no words of promise to pay the amount, could not be the basis of an action, nor would it be a transferable security. (Hotchkiss vs. Mosher, 48 N. Y., 482; Sibell vs. Tripp, 15 Mess. and Wells, 23; Huse vs. Hamlin, 29 Iowa, 501; Rindskoff vs. Barrett, 11 Iowa, 172.)

If considered as an acknowledgement of a balance due, it is not assignable so as to enable the assignee to sue in his own name. (Lacy vs. Collins, 5 N. J., (L.) 489; see also Ransom vs. Jones, 2 Ill., 291; Hubbell vs. Skiles, 16 Ind., 138; Broughton vs. Bagget, 1 Geo., 75.)

If the declaration is defective in substance, the error may be assigned in the Appellate Court, and it is not then too late to take advantage of a defect which would have been good in arrest of judgment. (Slocum vs. Pomery, 6 Cranch, 221; Hallet vs. Evans, 28 Ind., 61; Johnson vs. Perdido R. R. Co., 16 Fla.)

W. A. Blount for Defendant in Error.

This instrument at the common law was not negotiable, and any assignments of it would have passed the equitable rights of the assignor, together with any equity which would defeat it in his hands.

The act of November 23d, 1828, §§ 33 and 34, (Thomp. Dig., p. 348,) changes this, and vests the rights, powers and capacities, but not the liabilities, of the assignor in the assignee. This construction results from several considerations:

Such is the language of the statute which mentions the "rights, powers and capacities," but omits the liabilities. In

a legal sense, the transfer of a right or power does not necessarily carry with it a liability which may or may not be set up to defeat that right.

Any other construction renders the first sentence of § 34 meaningless. Other portions of these two sections confer all the other rights and powers necessary to make these instruments negotiable; and if this portion does not authorize a transfer free from equities, then it is nugatory. It was evidently the intention of the Legislature to place these instruments upon the same footing upon which the statute 3 and 4 Anne, c. 9, placed promissory notes, &c.; and it is difficult to see why the quality of transfer free from equity should be excluded when all other qualities are included.

That this court has virtually decided in favor of this construction. (Cotten vs. Williams, 1 Fla., pp. 53 and 54.) While it does not hold these instruments to be commercial paper, it holds them to be negotiable, a quality of commercial paper—a quality "by which not only the instrument is assignable at law, but the assignee for value *bona fide*, without notice, cannot be affected by any equities, as between the original or any prior holders." (Byles on Bills, 6 Am. Ed., p. 1. n. and p. 154.)

THE CHIEF JUSTICE delivered the opinion of the court.

Keyser sued Bellas in assumpsit, and alleged in the first count of his declaration that defendant executed the following instrument and delivered the same to L. A. Larsen, Master of the ship Kalliope, viz: "one hundred and eighty-three dollars and twenty cents. I hold for account ship Kalliope the sum of one hundred and eighty-three dollars and twenty cents for towage to sea of said ship.

PENSACOLA, May 3, 1877. HUGH BELLAS."

And, Whereas, on the — day of May, A. D. 1877, the

said ship was towed to sea under contract with said Master by plaintiff's steam tug, in consideration of which service the said Master endorsed the said instrument of writing as follows: "Pay the within amount to bearer." signed, "L. A. Larsen, Master of Kalliope," and delivered the same to the plaintiff; *and, whereas,* plaintiff has demanded payment of the same from defendant, but defendant has refused to pay the same and it has been protested, to plaintiff's damage, &c.

There were two other counts in the declaration but they were abandoned.

The defendant demurred to the first count that it presented no cause of action in favor of plaintiff. This demurrer was overruled with leave to defendant to plead over.

Defendant then filed a plea upon which plaintiff joined issue, and afterwards defendant filed two additional pleas, to which plaintiff demurred, and the court sustained the demurrer as to both, and gave leave to defendant to amend the first of the additional pleas. Defendant amended the first, leaving the judgment upon the demurrer to stand as to the second. The second additional plea is as follows: For a plea to said count the defendant saith that he and one Sullivan contracted with the Master of said ship for the consideration of one hundred and eighty-three 80-100 dollars to provide towage to sea of said ship; that the said Master left with the defendant, who was also the consignee of said ship, the said sum for the payment of said towage, and, as an evidence thereof, the defendant executed the said writing and delivered it to said Master, to be held by him until said towage should have been performed; that the defendand and said Sullivan were at all times ready and willing to perform said service, but that said Master violated said contract by procuring other towage to sea for said ship without the consent of said Sullivan or the defendant, and

endorsed and delivered said writing as alleged, as a consideration for the last aforesaid towage, and this, &c.

The ground of demurrer to this plea was that it was insufficient, because it alleges no connection of plaintiff with said contract, nor any notice thereof to him.

The parties proceeded to trial upon the issues joined and verdict was rendered for plaintiff, and judgment entered thereon. A motion for a new trial being overruled, defendant sued out this writ of error, and now assigns for error.

1. That the court erred in sustaining the demurrer to defendant's second additional plea.

2. That the court erred in giving judgment on said demurrer to the plaintiff, because of substantial defects in the declaration.

It is not contended that the paper set out as the cause of action is a valid, negotiable instrument, according to the law merchant. It is, however, insisted by defendant in error that by the statute of this State this paper is given the qualities and incidents of merchantable paper in the hands of a *bona fide* indorsee, for value, without notice.

The act to amend an act regulating judicial proceedings, approved November 23, 1828, (Secs. 33, 34, Thomp. Dig., 348,) provides "that the assignment or endorsement of any bond, note, covenant, deed, bill of exchange, or other writing, whereby money is promised or secured to be paid, shall vest the assignee or indorsee thereof with the same rights, powers and capacities as might have been possessed by the assignor or endorser, and the assignee or indorsee may bring suit in his own name."

This statute makes the several instruments described in it negotiable by assignment or indorsement, and gives a right of action to the assignee, who is clothed "with the same rights, powers and capacities as might have been possessed by the assignor," and no other. In other words, the

assignee or indorsee stands upon the same footing as the assignor would have stood if the assignment had not been made.

"It is not supposed that the object of this provision was to place these several classes of instruments upon a footing, in all respects, with commercial papers, yet the effect is to make them negotiable by assignment or indorsement." Cotten vs. Williams, 1 Fla., 37-53.

The court in the case cited does not say that the assignee or indorsee takes such paper absolved from all equities or defences, as in the case of paper negotiable in its terms, but only that it is negotiable or assignable by force of the statute, and that the indorsee or assignee may sue in his own name. We think this is the extent of the effect of the statute, and that notwithstanding the assignee may sue in his own name as the owner, by virtue of the statute, yet the language of the law places him, in respect to all "rights, powers and capacities," in the same relation to the maker of the paper as the original party would have stood if the assignment had not been made. Notice to the assignee of any equities or defences was, therefore, not necessary in order to enable the maker to avail himself of them in a suit by the assignee. 1 Dallas, 27; 2 Johns. Ch., 443.

The plea sets up the fact that this paper was a memorandum made in connection with a special agreement with the master for the towage of his ship; that the sum mentioned in it was the sum agreed upon in the contract of towage, to be in payment for the towage to be performed by the maker and another; that the money was left in the maker's hands as such payment, and the maker and his co-contractor were ready and willing to perform.

We do not see that this differs from any other case where a special contract is entered into for the performance of a service, and payment for the service is made in advance. The money cannot be recovered by the promisee unless the

promisor neglects or it has become impossible for him to perform.

The contract alleged in the plea is in every respect consonant with that implied from the terms of the paper itself. The maker acknowledges that he holds so much money "for towage of the ship to sea." His plea is that he holds the money as payment upon a contract to tow the ship to sea, and he is ready to perform. The plea sets up a legal defence to the action upon the instrument, and this plea is available as against any holder of it who seeks to recover the money, treating the paper as a "writing whereby money is promised or secured to be paid."

But the question arises, under the assignment of errors, whether this instrument is one of the class mentioned in the statute, a "writing whereby money is promised or secured to be paid."

Plaintiff in error insists that the declaration does not set out a cause of action; that the writing sued upon is not such a writing as may be assigned so as to enable the assignee to maintain a suit in his own name, or upon which a right of action can accrue to the plaintiff in this suit.

The demurrer to the plea reaches back to substantial defects in the declaration, notwithstanding a demurrer to the declaration may have been overruled and abandoned by pleading over. (Johnson vs. Pens. & Per. R. R. Co., 16 Fla., 623.)

The writing expresses that Bellas holds so much money for account of the ship, for towage of said ship to sea.

It is consistent with this writing that the towage of the ship had been performed by Bellas, and that he had so much money to apply on account of charges for such towage.

It is consistent also with the proposition that Bellas had engaged to perform the service, or to procure its performance, and that he held this money upon an agreement to

apply it in payment for the towage when performed. It is also consistent with the proposition that Bellas held this money upon some agreement that it should be paid over to whomsoever might be employed by either party to perform the towage of the ship to sea.

It is consistent with either of these hypothesis, and nothing in the writing favors either one more than another of them. It is evident then that the writing is a mere memorandum, a part of some agreement, or to be taken together with some agreement between the parties to the instrumnt, as to the proper application of the money for the service performed, or to be performed.

While this paper is thus consistent with and may be a part of either of the three several agreements stated, or some other, and thus not entire or independent in itself, (and this is apparent upon the face of the writing,) an action cannot be grounded upon it without averring the existence of some extrinsic fact which may render it intelligible and capable of enforcement as a contract or promise to pay money.

No such fact, or any fact, is alleged in the declaration to give a meaning to the memorandum, except that it was delivered to the master of the ship. Though the plaintiff in the suit towed the ship to sea, and the master directed by an endorsement that the amount of money mentioned in the paper be paid to the bearer and delivered it to the plaintiffs, as alleged in the declaration, these facts afford no stronger clue to the intention of the contracting parties than does the refusal of Bellas to pay over the money on the grounds alleged by him for his refusal.

As we understand this paper, standing by itself, and without other averments, it is not in its terms a "writing whereby money is promised or secured to be paid." The understanding or agreement of the parties to it may show it to be such a writing, not varying but explaining

its terms, and this rule is equally applicable to the defendant's plea.

If the plaintiff had averred in his declaration that this paper was made and intended to be a certificate of the deposit of so much money, to be held until the ship should be towed to sea, and then paid upon the order of the owners or the captain of the ship to the party who should perform the service of towage, to whom the paper should be assigned or indorsed, he would then have shown it to be a "writing whereby money is promised or secured to be paid," and, in the absence of any equities existing as between the signer and the owners, he might then recover the money in his own name. Proof of these facts duly alleged would give a character to the instrument, not inconsistent with its terms, and entitle the assignee to recover, if not overborne by any superior, legal or equitable rights of the depositary. Such proof would show the paper to be one of those included in the statute of 1828.

The judgment is reversed with costs, and the cause remanded, with directions to set aside the verdict and enter judgment for the defendant upon the demurrer and to dismiss the action, unless the plaintiff shall, upon such terms as the court may impose, elect to amend his declaration so as to show a right of action.

JOHN FRIEND, APPELLANT, VS. WM. B. C. DURYEE, APPELLEE.

1. In an action against two persons alleged to be partners, it is the right of each defendant to plead separately in his own behalf any defence available to him alone or to both.

2. Attorney-at-law, who are partners in the practice of their profession, and not partners *in trade*, according to mercantile law, have no implied authority to become parties to negotiable instruments and to bind the firm thereby, unless such authority is given by the terms of the partnership, or expressly given or recognized by both, or may be implied from the general habits of the partners in their business transactions.

Appeal from the Circuit Court for Nassau County.

The facts of the case are stated in the opinion of the court.

John Friend in pro per.

This first defence to the plaintiff's action is a good legal defence, for the rule of law in respect to the power of each partner to bind the firm by bills of exchange, promissory notes, checks, and other negitoable instruments, is not applicable to all kinds of partnership, but is limited to partnerships in trade and commerce, growing out of the general custom and law merchant, and does not apply to attorneys. § 102, Story on Partnership.

Parsons on Bills and Notes, Vol. I., Chap. V., pages 138 and 140, referring to Hedly vs. Bainbridge, 3 Q. B., 316; Levy vs. Payne, Car. & M., 453; Bellan vs. Spencer, 4 Cow., 163; Bank of Rochester vs. Bowen, 7 Wend., 158; 4 Dana, 375, Breckinridge vs. Shrieve; Chitty, on Bills, 54.

These allegations of facts, showing the actual agreement between the parties of the transaction, and the purpose of the indorsement, is another good defence to the plaintiff's

suit. Parsons on Notes and Bills, 2 Vol., Chap. 1, page 24, and authorities referred to, viz.: Pike vs. Street, Moody & M., 226; Wright vs. Latham, 3 Murph., 298; McDonough vs. Soule, 8 La., 472; Fuller vs. McDonald, 8 Greenleaf, 213; Cowles vs. McVicker, 3 Wis., 725.

Appellant claims that the indorsement of said draft by D. M. Hammond, in the firm name of Friend & Hammond, was made for the purpose of transfer only, and to the same effect as if the phrase "without recourse" was added. In other words, the indorser, and especially this appellant, cannot be made liable in any event. Parsons on Notes and Bills, 2 Vol., 428; and Cowles vs. McVicker, 3 Wis., 725, already referred to.

James M. Baker for Appellee.

It was held in Lanier vs. West, (2 Fla., page 41,) that any partnership or concern to which the issuing or transfer of bills is either necessary or usual, the indorsement of a bill made by one partner in behalf of the firm would bind the firm. Same principle stated in Chitty on Bills; Lanier vs. West, 2 Fla., page 41; Chitty on Bills, page 46.

It appears from the declaration, and is admitted by the pleas, that the partnership did exist, and that the draft was drawn payable to Friend & Hammond.

It then appears that the receiving bills or drafts, and (necessarily) the indorsing such drafts, was incidental to their particular partnership and usual in the course of their business, (which is not controverted,) hence the transfer of a draft by either partner under such circumstances, in behalf of the firm, would bind the firm upon general implied authority.

In partnerships, for the general practice of law, the transfering, or indorsing for transfer, drafts received by the firm, is usual and necessary, and an indorsement by one member

of the firm would bind the firm in the scope of the business.

An indorsement by one of several partners, if the partnership be proven, whereupon an authority may be implied, will be sufficient. Chitty on Bills, page 227.

The proposition that a law firm would not be liable under the circumstances disclosed by the records, is preposterous and fraudulent.

THE CHIEF JUSTICE delivered the opinion of the court.

Duryee, appellee, sued Friend & Hammond, as partners by that name, upon their indorsement of a bill drawn by the St. Mary's River Lumber Company upon G. D. Howell, of New Jersey, at sixty days' sight, payable to the order of Friend & Hammond, and accepted, before indorsement, by Howell. The declaration alleges that the bill was indorsed by "Friend & Hammond" to the plaintiff, was presented, when due, for payment, and duly protested for non-payment, and due notice thereof to defendants, &c., and defendants have not paid.

The defendant, Friend, pleads that himself and Hammond were not partners doing business in the firm name of Friend & Hammond in manner and to the effect alleged, but that the said Hammond and himself were partners only in the practice of law before the courts, and never were partners in trade or authorized to sign bills of exchange or otherwise to contract liabilities, which was well known to the plaintiff, and denies that he indorsed the bill or authorized the indorsement thereof for him.

And for a further plea on equitable grounds, the defendant, Friend, says that the draft on which the action is brought was not indorsed to the plaintiff as a usual commercial paper, but that plaintiff discounted and took the same from defendant, Hammond, at a large discount, and not for

the usual rate of exchange, after it was accepted by Howell, the drawee, with the understanding that plaintiff would take, and only did take said paper on the responsibility of the acceptor, Howell, who was represented by the plaintiff to be a good and responsible party, and that Hammond merely indorsed said paper in blank as a transfer of the same for the accommodation of the plaintiff to enable him to collect the same from the acceptor, and with the further understanding that the plaintiff would look to Howell, and not to the defendants, or either of them, for payment of the draft, which the plaintiff in equity ought to do.

The defendant, Hammond, pleads severally that the plaintiff bought the draft at a large discount from him, Hammond, after he had procured the acceptance thereof by Howell, a member of the firm called the St. Mary's River Lumber Company (the drawer of the draft); that it was understood at the time plaintiff purchased the draft, that plaintiff took it upon the known solvency of the acceptor, and that this defendant's indorsement was not for the purpose of guaranteeing the draft, but to enable plaintiff to collect the same from the acceptor, and simply to transfer the paper to the plaintiff.

The plaintiff demurred to the several pleas:

First, Because the defendants ought not to file several pleas, but should be required to plead as partners by joint and not by several pleas.

Second, That the first plea of the defendant, Friend, is insufficient and tenders no material issue; that it does not deny the indorsement of the draft by Friend & Hammond as partners, and traverses no material allegation in the declaration, and sets forth no defense to the action or an avoidance of the liability, and is evasive, double and uncertain, and not responsive to the declaration.

Third, That the said plea above pleaded by John Friend,

and the pleas above pleaded by D. M. Hammond, are insufficient in law, further, in that they do not plead in denial of the indorsement of said draft, as partners, to the plaintiff for a valuable consideration.

Fourth, That said pleas do not set forth any matter or facts discharging or relieving them from liability as indorsers.

Fifth, That said pleas set forth no legal defense to said action, and are frivolous and insufficient.

The demurrer was sustained, the pleas adjudged to be insufficient, and leave granted to defendants to plead over. The defendants declined to plead anew, and the court gave judgment by default, empanelled a jury, who assessed the plaintiff's damages at one hundred and sixty one 81-100 dollars, for which judgment was rendered with costs.

From this judgment the appeal is taken. The errors assigned are:

1. That the court erred in holding the defendants to be partners in trade, and in requiring them to plead by a joint plea as partners.

2. In sustaining the demurrer to the pleas.

3. In disregarding and setting aside defendants' pleas which set up a good defense.

4. In giving judgment by default for want of plea.

5. In giving final judgment for plaintiff.

As to the first error assigned, it seems that judgment was given upon the demurrer generally, and not upon specific grounds, and in effect it sustains every ground of demurrer. The first was that defendants should not sever, but plead jointly as partners. We find no authority for holding that a joint plea is indispensable, even if the fact of partnership in trade be admitted, but the effect of the judgment is to preclude the defendants from denying such a partnership, and assumes that it does exist. A paper may be signed with a partnership name by one of the partners, and yet the cir-

cumstances may be such that only one of them is bound; as where one gives a note signed with the partnership name for his individual debt without the consent of a copartner, or in any transaction not within the scope of the copartnership business, and in a variety of other cases.

The judgment here assumes the liability of both defendants and precludes the showing of any defense as to either of them, and also denies the right of one to plead in his individual capacity any defense which might go to the discharge of both, and even to the right of one of them to deny the existence of the partnership. The ruling is clearly wrong.

The second ground of demurrer is, that the plea of Friend tenders no material issue, is evasive, double, uncertain and not responsive.

The plea of Friend denies that defendants were general partners, or partners in trade, but says they were only partners in the practice of a profession, that he did not sign or authorize the indorsement of the draft, and that plaintiff knew the character of the partnership.

The declaration is against defendants as co-partners, upon their indorsement of a bill of exchange, and alleges merely a co-partnership, without in express terms charging the purpose of the co-partnership.

A partnership for the purpose of engaging in the practice of a profession, is not a partnership *in trade*. By the custom of merchants, long established in law, if one partner *in trade* draw, accept or indorse a bill or note in the name and seemingly in behalf of the firm, such act will render all the partners liable to a *bona fide* holder. (Chitty on Con., 45.) The partnership must be in a *trade* or concern to which the issuing or transfer of bills is necessary or usual, for otherwise a co-partner will not be liable for the act of his partner, unless he gave express authority. (Chitty on Con., 54, and notes.) Attorneys who are in part-

nership have no implied authority to become parties to negotiable instruments and bind the firm thereby. The authority to do such acts must in such cases be either expressly given, or be recognized as proper and necessary, or in the usual course of a particular business of that firm. (Story on Partnership, Sec. 102; Sweetser vs. French, 2 Cushing, 310; Harman vs. Johnson, 18 L. & E. Rep., 400; Parsons' Mercantile Law, 175; Lanier vs. McCabe, 2 Fla., 32; Bank of Rochester vs. Bowen, 7 Wend., 158; Breckenridge vs. Shrieve, 4 Dana, Ky., 375.)

The rule is thus given in 4th Dana: Borrowing money is not part of the regular business of an attorney and counsellor at law; from the existence of a partnership in that profession, therefore, no authority results to any member of the firm to obtain loans on the credit of the firm, unless authority is given by the express terms of the partnership contract, or may be implied from the general habits of the partners, and no other member will be bound by such contract without his express consent. We find no exceptions to this rule in the books. The declaration in this case does not allege the character of the partnership of Friend & Hammond, whether in trade or otherwise. By implication only can we consider it as charging that the draft was indorsed in the regular course of the business of the firm, and thus that it contains a cause of action. The first plea puts in issue this implied allegation, and, as we have seen, tenders a substantial issue and a defence. If true, it shows that Friend is not liable. The judgment is therefore erroneous, as to the second ground of demurrer.

The second and third errors assigned relate to the judgment of the court upon the grounds of demurrer that the other pleas of Friend and of Hammond set up no defence.

It is laid down in Chitty on Contracts, 265, that "if the indorsee of a note take it subject to an agreement not to sue the indorser, he is precluded from so doing." (Pike vs.

Street, Mood. & M., 226; and see Parson's Mercantile Law, 124.)

In the case of Cowles vs. McVicker, (3 Wis., 637, 643,) the court says "a note may be sold in the market *for less than its value* and the payee may indorse the note so as to pass the title. * * But the indorser in such case would not be liable for the payment of the note. This transaction would be a sale, nothing more nor less, and the indorsee might, if the indorsement were in blank, fill it up without recourse, and recover of the maker. But where a note is transferred by the payee and indorsed by him in the *usual manner,* or the payment guaranteed by him in consideration of a certain sum paid or advanced by the indorsee, the transaction is essentially a loan."

These authorities would seem to be conclusive that the facts pleaded constitute a defence to the action, and that the demurrer should have been overruled.

It is unnecessary to notice any other question raised by the assignment of errors, as the judgment must be reversed with directions to enter judgment overruling the demurrer, and that such further pleadings and proceedings may be had as may be according to law.

NORMAN WEBSTER, APPELLANT, VS. WILLIAM B. BARNETT, APPELLEE.

Appellant failing to file a copy of the record on the first day of the term of this court, in accordance with the statute, the appeal will be dismissed upon appellee's producing the certificate required by the rule. It is no answer to such motion to say that no final judgment has been entered in the Circuit Court.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

John T. Walker for the Motion.

Chas. P. Cooper contra.

THE CHIEF JUSTICE delivered the opinion of the court.

Counsel for appellee, upon filing the certificate of the Clerk of the Circuit Court for Duval county that an appeal had been taken and bond given in this cause on the 11th day of July, 1878, moves the court to dismiss the appeal, on the ground that no copy of the proceedings in said cause have been filed with the clerk of this court, notice of this motion having been given as required by Rule 17 of this court.

Counsel for appellant objects to the granting of the motion, and reads a stipulation of counsel for both parties, showing that the appeal was taken and bond given after verdict, and before a final judgment was entered in the Circuit Court.

The statute (Th. Dig., 448,) provides that if the appellant shall fail to file the copy of the proceedings by the first day of the term of the Supreme Court next succeeding the entry of the appeal, if the appeal was obtained thirty days

before said first day of the term, it shall be the duty of the court, on the appellee producing a certificate of the Clerk of the Circuit Court that an appeal was obtained and bond given on such appeal, unless good cause be shown, to dismiss the appeal.

The appellant, by way of showing cause why the court should not dismiss the appeal, shows that there was no final judgment from which an appeal could be taken. This is the reason why he has not prosecuted his appeal, but it is not "good cause shown" why the appeal should not be dismissed for his failure to prosecute it, or otherwise disembarrass the Circuit Court in its further action in the case; but it does show an additional reason for dismissing the appeal. If the copy of the record was here, and it appeared that an appeal had been taken before final judgment, it would be dismissed.

The appeal was irregular and improvident, and the statute gives this method of getting rid of it.

Appeal dismissed.

THE ORANGE COUNTY HIGH SCHOOL ET AL., APPELLANT, VS. HENRY S. SANFORD, APPELLEE.

1. Where the papers on file fail to show that an appeal was perfected or that a writ of error has been issued, the cause will be dismissed, no application being made to supply the record.

2. The papers on file not being certified by the Clerk of the Circuit Court to be a copy of the record, the party placing them on file has leave to withdraw them.

Appeal from the Circuit Court for Orange county.

The facts of the case are stated in the opinion of the court.

E. K. Foster and *Thos. Emmett Wilson* for Motion.

J. Wofford Tucker and *Daniel S. Walker, Sr., contra.*

THE CHIEF JUSTICE delivered the opinion of the court.

The respondent, Sanford, by his counsel, moves the court to dismiss this cause from the consideration of this court, because there has been no writ of error sued out to the Circuit Court.

An appeal was entered, but no bond given as required by statute, so that the appeal was not perfected. The papers contain a citation to the respondent, issued by the clerk of Orange county, citing him to appear and show cause why the judgment should not be reversed, but it does not appear that any writ of error has been issued by the Clerk of the Supreme Court, or of the Circuit Court. No application is made for a certiorari to supply the record.

It further appears upon examination of the papers filed, that the clerk has not certified the papers to be a copy of the record.

It is therefore ordered that this cause be stricken from the docket and dismissed from the consideration of this court, and that the defendants in the court below be allowed to withdraw from the files the papers filed by them herein, and that this order be certified to the Circuit Court, together with a copy of the opinion herein.

Ordered further, that the said Orange County High School and others, defendants, pay the costs incurred in this court.

MARGARET E. EMERSON, APPELLANT, VS. ROSS' EXECUTRIX, ET ALS., APPELLEES.

1. Where a deed purporting to have been executed under a power of a public and statutory nature is sought to be used in evidence, the power should be shown, and where the power is the order of a court of special and limited jurisdiction, and the record of the order or decree is presented, the question whether the deed was void for want of jurisdiction in the court to make the order or decree is a question of law for the court and not for the jury. Where, however, the opposite party, upon the introduction of the deed without the power, makes no objection, introduces subsequently the record of the order of the court, fails to ask the court to pass upon the sufficiency of the deed, relies upon instructions of the court covering the subject matter given at his request, and leaves the entire question to the jury, he cannot object to this action for the first time in an Appellate Court. The question here upon such an appeal is whether, upon the evidence, the finding of the jury was erroneous.

2. Where a grant of letters of administration is collaterally assailed, whether an appraisement was made or whether the party applying for the letters failed to allege in a petition that he was twenty-one years of age, are immaterial in a case where the ncessary jurisdictional facts are stated in the pleadings bringing the matter before the court, or appear on the face of the record. Under the statutes of this State, the Judge of Probate had a general and exclusive jurisdiction in the matter of granting letters of administration. In this case, the death of the intestate, possession at the time of death of goods, chattels and lands in the county in which the letters were applied for, and that the intestate had a mansion house in that county, are alleged in the petition, or appear in the record, and this is sufficient.

3. Where a person entitled to distribution of the estate in the order of consanguinity applies for letters of administration, a previous publication of citation is not required.

4. The oath of an administrator is properly filed in the office of the Judge of Probate.

5. Under the statutes of this State regulating the sale of lands by administrators under an order of the Probate Court to pay debts, no

petition was required. A failure to file a petition, or the filing of a petition failing to set up the necessary jurisdictional facts, is immaterial. Where notice of the intended application is given, as required by statute, and the court in its order of sale finds and recites the existence of the jurisdictional fact, and the record discloses jurisdiction, it is sufficient, and the deed is not void for want of power shown.

6. The recorded deed of an administrator upon a sale of the lands of a deceased intestate for value and without notice, will vest a good title as against a prior unrecorded deed of the deceased intestate.

7. Where the charge of the court is principally as requested by the appellant, there is no exception of a general character to the other charges given, the appellant fails to point out any error and there is none to his prejudice apparent to the court, a general assignment of error that the verdict is contrary to the charge of the court is not available.

8. An assignment of error to the effect that the charge of the court is conflicting, coupled with a failure to point out or suggest the precise nature of the conflict, no exception upon this ground being made upon the trial, and no conflict appearing to the court, is not available.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

Knight & Jordan for Appellants.

Robinson & Whitney, W. A. McLean, F. F. L'Engle, for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an appeal from a judgment of the Circuit Court for Duval county. The action was ejectment for a lot of land in the city of Jacksonville.

Plaintiff (appellant here,) claimed title through deed of her mother, Sarah A. Houston, bearing date the 24th day of November, A. D. 1854. Defendants (appellants here,)

claim title through sale by William A. Houston, administrator of the goods and chattels of Sarah A. Houston, plaintiff's mother and grantor in the deed mentioned. The administrator's deed is dated the 27th day of September, A. D. 1866. The deed to plaintiff was not recorded until September 2, 1875. It is not claimed that the purchaser at the administrator's sale had notice, either actual or constructive, of the deed of the deceased intestate to her daughter, the plaintiff.

In the Circuit Court the defendants claimed that there was no delivery of the deed of the deceased intestate to the plaintiff. In the view we take of the case that question is not material, as it may be admitted that there was a delivery, and it would not affect our conclusion. We treat the case, therefore, as if there was an admitted delivery. The plaintiff, upon the opening of the trial, having introduced her deed from her mother with evidence as to the delivery, rested. The defendants introduced deeds deraigning title under a sale by the administrator of the intestate, by virtue of an order of the Judge of Probate of Duval County The plaintiff not objecting to the deeds at the time they were offered, subsequently introduced the record of the Probate Court of Duval county in the matter of granting letters of administration to William H. Houston, as well as the matter of sale under the order of the Probate Court. There were no exceptions to testimony on the trial having any material bearing upon the question presented for the consideration of the court.

Plaintiff in the Court below (appellant here,) claims that whether the record of the proceeding of the Probate Court was sufficient to show jurisdiction in that court to order a sale of the land was a question of law which the court should have decided, the court having left the whole matter to the jury, under general instructions covering collateral inquiries into sales of land by administrator under or-

ders of the Probate Court. The action of the court here in admitting the deeds without showing the power under which executed, was not excepted to. The general rule upon this subject is that, if a deed purport to have been executed under a power, either of a private or of a public and statutory nature, and is sought to be used in evidence, the power must be shown. (1 Tay., 25; 14 Wend., 619; 4 Mon., 392; 2 Ran., 93; 4 Mon., 39; 4 Pick., 160; 13 John., 307; 2 G. and J., 114; 2 Bing., 483; 8 T. R., 178; 2 East, 66; 5 How., 370; 11 Wend., 125, 422; 3 Mon., 99.)

Had the plaintiff objected to the introduction of the administrator's deed when offered, the record of the Probate Court authorizing the sale must have been presented. This having been done, the question whether the court had jurisdiction would have arisen. This question it would have been the duty of the court to decide. When, however, the plaintiff makes no objection to the admission of the deed without showing the power, introduces subsequently the record of the Probate Court, does not ask the court to pass upon the sufficiency of the deed, and relying upon instructions of the court covering the subject, leaves the entire question, under instructions of the court, to the jury, he cannot object in an Appellate Court to this action. Under such circumstances the question here presented is whether, upon the evidence, the finding of the jury was erroneous.

This brings us to the consideration of the first two errors assigned, which are that the verdict was contrary to the law and the evidence.

It is insisted that the proceedings of the Probate Court were shown by the records introduced by the plaintiff to be void, both as the matter of the administration as well as to the sale by the administrator.

In the matter of the administration, the record discloses a petition of William H. Houston, alleging that his mother,

Sarah A. Houston, died intestate, having at the time of her death a mansion house and place of abode in Duval county; that he is entitled to a distributive share of the estate, and prays grant of letters of administration. There is proof of publication for thirty days of notice of intention to apply for such letters of administration, an oath conforming to the statutory requirements, a grant of letters in the usual form, and a bond. It is insisted that, in addition to what is above set forth, the petition should state that the applicant was twenty-one years of age; that citation was published for the term of six weeks, once a week, in some newspaper; that his exact relationship to the deceased intestate in the order of consanguinity should be stated; that the oath should be filed in the office of the Clerk of the Circuit Court; that the appraisement should show the number of the intestate's family and the property they had exempted.

As to the matter of citation. No citation is required where the husband or wife of the deceased intestate, or a person entitled to the distribution of the estate in the order of consanguinity, applies for letters. Here the party applying alleges that the intestate was his mother. He was the son of the intestate and one of the heirs and distributees. It is only where the grant of letters of administration is to be to "a creditor of the intestate or some fit person," other than the husband, wife or person entitled to distribution, that any citation is necessary. The oath was properly filed in the office of the Judge of Probate. Under the organization of the courts of the Territory of Florida, the County Courts had jurisdiction of matters of administration. These courts had a clerk, and it was in his office that the oath was to be filed. The Probate Court, as organized by the Constitution of the State, had no clerk. All laws of the Territory not repugnant to the provisions of the Constitution were continued in force by that instrument, and the appointment of a Judge of Probate in each

county, with the powers of the Territorial County Courts, was provided for, and the necessary consequence was that the office of the Judge of Probate and not the office of the Clerk of the Circuit Court was the proper place in which to file the oath. As to the matter of the appraisement it is immaterial whether one was ever made or not. The grant of the letters of administration preceded it and their validity in nowise depended upon it. As to the fact that the party applying was twenty-one years of age: Where the grant of letters is questioned collaterally, it is not necessary that the record should affirmatively state the qualification of the party to whom the letters were granted. And, generally, as to the necessity of a petition at all, it may be remarked that the statue requires none.

The judicial officer had a general and exclusive cognizance of the matter of granting letters of administration. The only facts necessary to give the Probate Court jurisdiction were the death of the intestate and possession at the time of death of "any goods, chattels or lands in any county in this State." Here the petition alleges that the deceased intestate had a "mansion house in the county of Duval," and the record discloses that she was, at the time of her death, possessed of goods and chattels in the county of Duval, and the grant of letters in that county carries the right to execute the trust until it is vacated or set aside by some direct proceeding. (3 Wall., 403; 12 Wend., 102; 28 N. Y. R., 641; 13 Kan., 527; 62 Ill., 150; 39 Ill., 563; 42 Ill., 149; 24 Mo., 266; 27 Vmt., 581.)

Thus disposing of the question of jurisdiction, so far as it concerns the granting of letters of administration, we next inquire as to the matter of the sale of the land by the administrator.

It is insisted that it appeared from the record of the proceedings in the matter of the sale by the administrator that

the court had no jurisdiction of the subject matter, no jurisdiction of the cause, and that the sale was void.

The following positions are taken and insisted upon:

That, in order to confer jurisdiction on the Probate Court to order the sale of real estate, the petition of the applicant in either case should contain such statements as would make it good upon demurrer; that the record should show that the personal assets had been exhausted; that the amount of the debts existing and the amount necessary to supply the deficiency should be shown, as well as that the land was sold in front of the Court House door of the county on the first Monday in the month. There can be no objection that the amount of the indebtedness should be set up in detail here. The statute requires no such allegation. It appears from this record that there was an indebtedness, and that is sufficient, even if the appellants view that such indebtedness must affirmatively appear in order to give jurisdiction, a question which it is here unnecessary to decide. (3 Wall., 405, 406.) It appears from the record that the notice of the sale was given. Any irregularity of the character alleged in this sale after due notice, if the jurisdiction attached under the previous proceedings, cannot affect the sale in a collateral proceeding. The deed is not open to assault upon such ground. Nor is it necessary that the record should disclose what is the precise amount of the deficiency of personal assets. It is only necessary that it should state in a proper manner that there was an exhaustion of personal assets. These matters relate to the regularity of the proceeding and are to be corrected upon *certiorari*, writ of error, appeal, or some other proceeding by which errors and irregularities are reviewed. The question here is one of power and jurisdiction.

Having disposed of these questions, it is necessary to state the precise condition of this record in order to understand the exact question presented in the Circuit Court and

in this Court. The petition here filed sets up that the personal estate is not sufficient for the payment of the debts, and that the premises cannot be equally and fairly distributed among the heirs of the deceased intestate. There is no testimony in the record. The order of the court contains a recital as follows: "The administrator having shown to the court that the four week's notice has been given files his application for an order to sell certain real setate for the purpose of paying debts and of distribution of the heirs of the deceased, and *having shown that the personal assets are exhausted,* it is therefore ordered." The remainder of the order simply authorizes a sale and directs compliance with the statute regulating the sale.

The petition here fails to set forth any case of which the Probate Court has jurisdiction. Hence it follows that if it is essential in this State that an administrator should file a petition setting up the facts necessary to give jurisdiction to the Probate Court in the matter of the sale of lands of intestate estates under its order, then there is here no jurisdiction in the court, and the sale is void. If, on the other hand, there is no necessity for such petition and the recital of proof, the jurisdictional fact in the order of sale and evidence of giving the notice of the intended application, both of which appear in this record, are sufficient, then there was jurisdiction, and the deed was not void.

To these questions we address ourselves. The court in the case of Hays vs. McNeely, (16 Fla., 413,) stated that in order to show jurisdiction the petition for the sale should set out, either in words or substance, that the personal assets are exhausted; that this fact should at least appear from the record; that it was a jurisdictional fact necessary to be alleged or to appear in order that the court could authorize the sale by the administrator. In that case no such fact was alleged in the petition, nor did the order of sale made by the court recite that it was shown as in this case. That

case is therefore different from this. Looking to the particular character of our statute and the decisions of the courts in cases where the statutes are similiar to ours, we are of the opinion that the recial of a finding of the jurisdictional fact by the court is sufficient to make a *prima facie* case of jurisdiction upon a collateral enquiry of this character, under the circumstances of this case, and that the failure to file any petition at all would not be fatal under our statute. "Real estate shall be considered assets in the hands of executor or administrators, and after the personal assets are exhausted may be sold under an order or decree from the Judge of Probate or officer discharging the functions of ordinary or Judge of Probate, such sale always to be made after public notice thereof, to be given in like manner as in sales of real estate upon execution from the Circuit Courts of this State, and always at public auction, to the highest bidder; *Provided, however,* in every such case that no sale of real estate shall be made to any greater extent than shall be necessary to supply the deficiency of personal assets for the payment of the just and lawful debts of the deceased, nor shall any such sale be ordered without notice for at least four consecutive weeks previously given in some public newspaper nearest to the place where such real estate is situated, of the intended application for such order or decree."

"It may and shall be lawful *upon such notice* for the Judge of Probate, or officer discharging the functions of ordinary or Judge of Probate, to order or decree a sale in like manner of the real estate of any deceased person in preference to a sale of the slaves, where it may be necessary for the payment of just and lawful debts," &c. (Thomp. Dig., 202, 203.)

The sale of lands in preference to slaves, it is seen, is expressly authorized *"upon such notice"* as is required by the preceding section for the sale of lands after exhaustion of

personal assets, and it is but reasonable to conclude that a sale upon notice, in either case, was all that the Legislature intended should be required.

Looking to all of the legislation upon the subject of the Probate Court in this State, it is evident that the Legislature did not intend it should be a forum where all of the niceties and strict rules and system of pleading in ordinary actions at law should prevail.

A careful examination of the first section here recited shows that there is no statutory requirement of a petition or written pleading of any character in the matter of sales of lands by administrators to pay debts after exhaustion of personal assets.

In this case the notice of intended application is given in a newspaper as required, and the fact of exhaustion of personal assets is recited in the decree as a fact shown. While the better practice, no doubt, is to file a petition setting up a schedule of debts, the fact of exhaustion of personal assets, and other proper facts in the case, yet in the absence of such statutory requirement, and there is otherwise a strict literal compliance with the law, coupled with a recital of the jurisdictional fact in the order of sale, we cannot see that anything in addition to what is prescribed by the statute controlling the subject can be required by this court.

There are cases in which it is held that a petition is necessary, but it will be found upon examination that the statute controlling the subject differs materially from the statute of this State. Under the revised statutes of New York, (2. R. L., 39; 20 Wend., 240,) it was required that the petition should set forth the amount of the personal property and the outstanding debts, and the Court of Appeals of the State in Ford vs. Walsworth, (15 Wend., 405,) held that these facts not appearing in the petition and no proof of them being presented, there being no such recitals in the

deed, it did not appear that the surrogate had jurisdiction in the matter.

Under the statute of California, a petition setting up the jurisdictional facts is required, and the Supreme Court holds that it is essential. (50 Cal., 398.) We say nothing as to the correctness of these decisions, and they are mentioned only to show the difference in the statutes of these States and ours. So far as we have been able to examine the cases, we find that wherever it is held essential to the jurisdiction of the court that a petition should be filed, the statute requires it.

We think, under our statute, that the recital in the order of sale that exhaustion of personal assets was shown, is sufficient to make at least a *prima facie* case of jurisdiction. Whether it is conclusive we do not say, as that question is not here involved. In the absence of any statutory requirement as to a petition and its contents, the principle controlling the subject is such as is announced in other cases which treat of the exercise of like special powers and statutory authority. In Barber vs. Winslow, (12 Wend. 102,) an inssolvents discharge was brought before the court collaterally, and it was held that the discharge was *per se* evidence sufficient of the facts indispensable to give jurisdiction to the officer, and that the officer had jurisdiction might be proved by relying on the facts set forth in the discharge, the court remarking that the record of a court of limited and special jurisdiction which contains the allegation showing jurisdiction in the particular case, is *per se* sufficient to uphold the judgment until the contrary is shown. See also as involving the same principle, 11 Wend., 249; 3 Wend., 47; 29 N. Y., 106; 2 Wall., 210; 1 Brod. & Bing., 137.

In treating of this principle the Supreme Court of Alabama remark that "whether the jurisdictional fact actually existed cannot be collaterally inquired into if the tri-

bunal to whose cognizance the question is referred determined it to exist, but if the record fails to show the fact, either actually or by the determination of the court, then the basis on which the right to the special remedy rests is wanting, and the whole proceeding is void." We think these cases settle the principle which controls this case. The statute not requiring a petition, its absence does not render the proceeding void, and the court having found that an exhaustion of personal assets was shown, the sale under the circumstances of this case was not void.

This brings us to the last question, and that is which of the deeds here prevails, the unrecorded deed of the deceased intestate, or the recorded deed of her administrator following an order of sale by the Probate Court, the purchaser being in possession. Our statute upon the subject of recording conveyances of real estate provides that "no conveyance, transfer or mortgage of real propetry, or of any interest therein, shall be good or effectual in law or equity against subsequent purchasers for a valuable consideration and without notice, unless the same shall be recorded in the office assigned by law for that purpose."

Upon general principles a sale of an administrator for a valuable consideration and without notice, vests the title in the purchaser to the same extent that a like deed by the heir would where there were no debts. The power of the administrator to sell, as well as the power of the Probate Court to direct a sale, is not a power to be exercised at discretion, but is conferred under a state of circumstances defined and fixed by law. Upon the decree of the court and sale, all the right and title of the intestate, as well as the heir and administrator, passed to the purchaser. As to the general disposition of intestate estates, the Legislature has plenary power. If, upon the death of the ancestor, any title passed to the heir or administrator, it was by the decree under the law divested, and the sale under the power

by the administrator was potential to pass the entire interest. (2 Pet., 523; 16 Fla., 416; 16 Fla., 154; 2 Fla., 94; 3 Fla., 175)

We take it, therefore, that there is no difference in principle between such a deed by an heir and such a deed by an administrator. Some of the cases upon this subject hold that the second deed is inoperative, because, in the view they take of it, after the first deed nothing was left to descend to the heir, or to pass as an asset to the administrator. We do not think this is correct, for the reason that an unrecorded deed does not, under the law, vest an absolute estate. Under the recording statutes, the absolute title rests with the grantor in abeyance, and does not irrevocably pass to the grantee until the deed is recorded. There is such an estate left in the grantor as, upon the recording of a subsequent conveyance to a *bona fide* purchaser for value without notice, divests the entire estate passed by the prior unrecorded deed. If the intestate were alive, his second deed to such a purchaser for value would pass the estate. Does the estate upon his death pass absolutely to the first grantee? Unquestionably not, for what he has goes either to the heir or administrator. The statutes of descents and distribution direct nothing of the kind. Upon the death of the intestate, his heir, in the absence of debts, his administrator, viewed in reference to the Probate Court, upon exhaustion of personal assets, stands, according to the true intent and meaning of the statutes controlling the subject of intestate estates and descents, in the same place as the intestate. The administrator is his legal representative, with defined powers, and, so far as this matter is concerned, the power and estate which existed in the intestate before his death passes to his administrator, acting under the order of a court having jurisdiction.

The estate or power existing in the grantor where there is an unrecorded deed, must have either ceased to exist or

have gone to the heir or administrator. There is nothing from which it can be inferred that the unrecorded deed by the death of the intestate became of any greater force or effect. Looking to the intention and object of the Legislature in passing the recording statutes, it is clear that the evil which they intended to remedy attaches as well to apparent ownership in the heir or administrator, as in the deceased intestate when alive. The object of this statute is to make patent, to disclose to the world the holder of the legal title, in order that purchasers for value might be protected against the secret deeds of the grantor. No deed being recorded, the title is apparently in the grantor, and the law protects the party who expends his money on the basis of this apparent ownership. In the case of his death, his heir or his administrator, with a decree of the court authorizing a sale, is the apparent owner of the legal title, and it is equally as important and equally as just that the public should be allowed to deal with them as with the original grantor if living. The cases upon this subject (15 Ill., 158; 2 S. & R., 44; 3 Yerg., 346; 39 Mo., 110; 4 Mon., 120; 6 B. Mon., 531; 24 Conn., 211; 46 Mo., 239,) are conflicting, but we think that the doctrine we have stated is correct.

The third error here assigned is that the verdict was contrary to the charge of the court. In what respect this is thought to be true by the appellant, neither the record nor his brief discloses. The charge of the court was principally as requested by plaintiff, and if there was any error it was not to his prejudice.

The fourth assignment is that the charge of the court was conflicting. While the charges which it is claimed are conflicting are named, the appellant does not inform us in what respect there is conflict. Without entering into any elaborate criticism or comparison of the charges, we will only say that no such matter was called to the attention

of the Circuit Court, no ruling of that court was had upon the subject, and no exception to action involving the matter is in the record for review. It is not enough in this court to simply state an assignment of error. If nothing more than this is done and the appellant attempts in no way to show error, it is an abandonment of the assignment. In addition to this, upon an examination of the charges, we can find no necessary conflict. There are some charges that are necessary and more charges than the points arising out of any reasonable and fair construction of the evidence required.

The judgment is affirmed with costs.

Afterwards the appellants filed the following petition for a rehearing:

The petition of Margaret E. Emerson, appellant in the above entitled cause, by her attorneys, Knight and Jordan, respectfully showeth to this honorable court that in the opinion and decision rendered by the court in said cause the following point made by appellant in the printed brief submitted to this honorable court, was not covered as fully as appellant deems the nature and justice of the cause demands, and that said point was one of the principal points relied upon by appellant in the prosecution of her cause. Said point is as follows, to-wit:

"In order to sell the real estate the administrator should show that the *personal assets* HAD BEEN EXHAUSTED, said sale to be made after public notice like sales of real estate upon execution from the Circuit Court of this State. And no sale of real estate shall be made to any greater extent than shall be necessary to supply the deficiency of personal assets for the payment of debts of the deceased, (Thomp. Dig., pages 202-203, Sec. 2.) The record does not show that the personal assets had been exhausted, and the

amount necessary to supply the deficiency,or even what the debts were. Neither does it show that the Judge of Probate *directed or limited the sale only to an amount* SUFFICIENT *to* SUPPLY THE DEFICIENCY."

Your petitioner further shows that the point made by her in paragraph 9, on pages 3 and 4 of the printed brief submitted by her to this honorable court, was not passed upon, or not fully passed upon by the court, in the opinion rendered in said cause, and that said point was also one of the principal points relied upon by her in the prosecution of her cause. Said point is as follows:

"The petition for the sale of real estate in this case contained statements upon its face sufficient to have precluded the Probate Court from exercising jurisdiction to order the sale. It evidently comes under section 6, page 203, of Thompson's Digest, and not under section 2, of pages 202 and 203, and contemplates proceedings in the Circuit Court instead of the Probate Court. In such a case the petition should set forth that the personal estate of the intestate is not sufficient for the payment of the debts of the intestate, or that the real estate cannot be equally, fairly and beneficially divided without such sale. The petition should also describe the real estate, the names of the heirs or devisees, stating particularly which are of age, and which are infants and femmes covert, in case the estate is sold to effect a divison; and in case the sale is for the payment of debts, the amount of the debts, to whom and when due, and the nature and evidence by which they are established.

"By section 2, page 202, Thompson's Digest, the Probate Court could only order a sale of real estate for the payment of the *just and lawful debts of the deceased.*

"The order of sale in this case was for the purpose of paying debts, and of *distribution among the heirs.* The petition for sale states that the personal estate is *'not sufficient'* for the payment of the debts of the intestate; and

also that it cannot be *fairly and equally distributed among the heirs of the intestate unless sold.* Therefore the *petition* and *order of sale,* brings it under *section 6, page 203, Thompson's Digest, and the sale should have been made by order of the Circuit Court.*

"Therefore the Probate sale was null and void. *The latter part of section 6 is, in no respect, complied with.*"

Your petitioner further shows, that the opinion rendered by the court in said cause contemplates that in the point made by the appellant, the charges given by the court below were conflicting. No conflict in said charge was pointed out to this court by appellant; whereas, on appellant's printed brief, page 10, appellant distinctly pointed out the conflict in said charges of the court below, as follows, to-wit:

"The next point we make is that the charge of the court was conflicting. Charge seventh, for plaintiffs, and charge seventh for defendants, are in conflict in this: That for the plaintiff the court decided that the Probate Court never had jurisdiction; and hence, charge seventh for defendants, should not have been given. Charge tenth, for defendants, is also in conflict with charge seventh for the plaintiffs.

"Charges three and four, for defendants, are in conflict with the charge given for plaintiffs, on the same subject. The first charge given by the judge of his own accord is in conflict with the charge on the same subject-matter given by him at the request of the plaintiffs."

For these reasons appellant believes that she is entitled to a re-hearing of her said cause by this court, and respectfully prays that the same be granted

MR. JUSTICE WESTCOTT delivered the opinion of the court, refusing a rehearing.

In the opinion of the court, the question of the jurisdiction of the Probate Court in this case is stated accurately as it is presented by the record. The court confined itself to the consideration of *this case,* carefully examined the whole subject, announced the principle controlling *this case,* and applied it. The order of sale of the court directs no distribution of the proceeds of the sale if there is any excess after payment of debts, and the final order of the court, rendered after the sale, directs the administrator to "hold" the balance, if there should be any. If, in such case, there should be a small excess, it would not affect the jurisdiction of the court. All of the instructions as to the necessity for a petition which the court gave at the request of the plaintiff, were unnecessary. The court should have simply instructed that the statute requiring no petition in such a case, it was immaterial that an improper one had been presented, if the court found in its decree that the jurisdictional fact was shown.

As to the charges of the court.

It is true that the appellant states that there was conflict in "charge seven for plaintiffs, and charge seven for defendants in this, that for the plaintiff the court decides that the Probate Court never had jurisdiction, and hence charge seven for defendants should not have been given." The statement does not disclose where the supposed conflict is. It does not even recite charge seven for the defendants. But whether there is or is not a statement of conflict such as is claimed by appellant, is immaterial. Charge seven for plaintiff simply states under what circumstances the Circuit Court has jurisdiction to sell the lands belonging to intestate estates. This was not such a case; there was no order of the Circuit Court here, and the charge was unne-

cessary. Charge seven for defendants is to the effect that in an action of ejectment involving the effect of an administrator's deed, the regularity or legality of an administrator's appointment cannot be inquired into collaterally, if it was brought before the court by proper petition. This charge also directed that if it was found that the proceedings in administration were substantially regular, and the Probate Court had jurisdiction, the administrator's deed, if recorded previous to 1875, takes precedence of any previous unrecorded deed. These charges relate to different matters, and to state that there is any conflict is such a clear misapprehension as would only result from a failure to make any accurate examination of the matter.

As to the other alleged conflicts, it is only necessary to refer to what is stated in the opinion.

JOHN S. PURVIANCE, APPELLANT, VS. WILLIAM EDWARDS, APPELLEE.

1. Where a judgment in a suit against an alleged firm has been rendered against a person who is not a partner, and who was not served with process, a court of equity will perpetually enjoin proceedings under the judgment.

2. Where a defendant interposes no defence, relying upon the assurance of the plaintiff's attorney that he will not take judgment against him or hold him in any way responsible, and the plaintiff, contrary to this written promise and assurance, does take a judgment, a court of equity will enjoin its execution.

Appeal from the Circuit Court for Alachua county.

The appellee (Edwards) and others were sued as partners, doing business under the firm name and style of The Fernandina Lumber Company. Judgment was rendered against

them *in open court* at the May Term, A. D. 1869, for $706,-28 and costs. On the 17th day of September, 1877, Edwards made a motion before the *Judge* of the Circuit Court at Chambers to vacate the judgment, and on the 25th day of September the Judge made an order at Chambers vacating the same. The other facts necessary to a full understanding of the opinion are stated in it.

B. H. Thrasher and *P. H. Young* for Appellants.

E. C. F. Sanchez for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The final order of the court made in this cause, and from which this appeal is taken, sets aside and vacates the judgment herein before that time rendered as to defendant Edwards.

Edwards was sued as a member of a firm, as one of several partners. The service of the writ, so far as he was individually concerned, was not in conformity to the statute, the return of the officer being "executed by leaving a copy at Wm. Edwards' residence with his father," while the statute (Thomp. Dig., 326,) requires that a copy shall be left at the usual place of abode of the defendant with some person of the family above the age of fifteen years, informing such person of the contents thereof. 13 Fla., 366; 1 Scam., 174; 2 Greene, (Iowa,) 479; 1 Pike, 50; 5 How., (Miss.,) 661.

There are two grounds upon which the court based the order from which this appeal is taken. They were that from the proofs submitted Edwards was no partner, and that there was fraud in obtaining the judgment against him.

The suit here brought was against a firm of which de-

fendant Edwards was alleged to be a member. As we have stated, there was no service under the statute as to Edwards, but there was service upon other members of the firm. As to service of process upon a partnership, our statute provides that service on any one member shall be as valid as if served upon each individual member thereof, and that the plaintiff, after service upon one member, may proceed to judgment and execution against them all. It cannot be doubted that the enactment of this statute was within the power of the Legislature. (4 Mich., 320; 8 Iowa, 474; 23 Wend., 304; 15 Wend., 374-610; Pet. C. C. R., 74.) So far, therefore, as this is a judgment against the partnership, it is effective whether the appellee here is or is not a member of the firm. It is entered, after due service of process, in conformity to statutory requirements covering the subject. This being so, neither a court of law nor a court of equity should so act as to impair the right of the plaintiff resulting from his judgment against the partnership.

Without reciting at length the affidavits covering the first ground, viz.: that Edwards was not a member of the firm, we will state that they do not show conclusively to our minds that Edwards was not a member of the firm. The evidence upon this subject consists principally of the statements, under oath, of Edwards alone. We think the court should have required upon this point further and more satisfactory proof. But in the view we take of the case, we deem it unnecessary to decide whether, upon full proof of the fact that Edwards was not a member of the firm, the judgment against the firm should have been vacated as to him, as we think a complete and proper disposition of the case follows a consideration of the second ground of the action of the Circuit Court. This ground is thus stated by the court. It seems that as soon as Edwards found that he had been sued, he went to plaintiff's attorney

and advised him that he was never a member of the company, and that he should defend the suit to the bitter end, and that thereupon the plaintiff's attorney gave him a written guarantee that he would not, in any way, endeavor to make him (Edwards) responsible for the indebtedness sought to be recovered in said suit. That plaintiff's attorney said further, "we are fully advised that you are in no way responsible for the transactions of the company, and have no design of making you in any way liable by the pending suit. Please receive our assurances for ourselves and the plaintiff that the object of the suit, so far as you are concerned, is only as above indicated." These facts, as stated by the court, appear from the record. Upon a motion to vacate a judgment unedr these circumstances, what is the proper order to be made by the court?

We find one case (45 Vmt., 395,) in which the court, after rendering the judgment, vacated it at a subsequent term, upon grounds somewhat similar to those herein set up, but the general practice in cases of this character is for the court of law to grant a stay of proceedings and to remit the party to a court of equity, where, by injunction, he can prevent and restrain the party from availing himself of such judgment. 2 Story Eq., 887; 7 Cranch, 332; 1 Mad. Chy., 131; 3 John. Chy., 356; 6 John. Chy., 90; 2 P. Wms., 424; 4 John. Chy., 22; 47 N. H., 507; 21 Iowa, 63; 12 New York, 168; 30 Ind., 435.

As to the first ground that Edwards was not a partner, it may be made the subject of equitable cognizance under the circumstances of this case. Says Collier, C. J., in Fowlkes & Co. vs. Baldwin, Kent & Co., 2 Ala., 706, "if a judgment has been rendered against a party who is not a partner, and who was not served with process, it will be competent for a court of equity to afford him relief by perpetually enjoining its recovery."

The Circuit Court should have ordered a stay of pro-

ceedings, with leave to defendant Edwards to file, within a time to be named, a bill in chancery, as he might be advised.

The order vacating the judgment is set aside and the case is remanded, with directions to proceed in conformity to the opinion herein rendered. Each party will pay their own costs.

HENRY PFEIFFER AND DANIEL F. SULLIVAN, APPELLANTS, VS. CHESTER P. KNAPP, APPELLEE.

1. A ward after arriving at his majority may call his guardian to an account in a court of equity. In such suit the sureties upon the guardian's bond may be made defendants with the guardian.

2. Where, after the giving of bond, the guardian, to discharge a debt due by him in his private capacity to the executor of the will of the ancestor of the ward, receipts to the executor for the whole or a part of the distributive share of the estate coming to the ward, but there is no actual receipt and transfer of the money, the executor simply crediting himself with the amount as so much paid to the guardian on account of the ward, the guardian is chargeable with such sum in his accounts with the ward, and the sureties upon the bond are liable therefor in case of his failure to perform his trust in accordance with its conditions.

3. Mere indulgence at the will of the creditor extended to the debtor, in no way discharges the obligation of a surety. There must be at least a valid common law agreement.

Appeal from the Circuit Court for Escambia county.

The facts of the case are stated in the opinion of the court.

G. A. Stanley for Appellants.

W. A. Blount for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is a suit in equity by a ward, Chester P. Knapp, after attaining his majority, against his guardian, Hampson, and the sureties upon the guardian's bond, Pfeiffer and Sullivan. The plaintiff, in his bill, alleges the receipt of named sums of money by the guardian from the executor of the will of his father, a failure upon the part of his guardian to make any account of his trust, and his failure to pay the sums due plaintiff from his father's estate so received by him.

After admitting the receipt of small sums from his guardian, he prays an account and for a decree for the sum to be found due against the guardian and his sureties, Pfeiffer and Sullivan.

To the original bill the Governor of the State of Florida was a party plaintiff.

To this bill the defendants interposed a demurrer.

The grounds urged in its support were:

First. That the Governor of Florida is improperly joined as a party complainant.

Second. That the defendants, the sureties, are improperly joined as parties defendant.

Third. That the County Court has full jurisdiction in the premises.

Fourth. That the plaintiff Knapp has a complete remedy at law.

There was joinder in demurrer, hearing and judgment overruling the demurrer, upon plaintiff's striking out the "Governor of the State of Florida" as a party, with leave to defendants to answer. The amendment being made, defendants answered.

There is no question made in argument by appellants as to the propriety of this ruling of the court upon the de-

murrer. There can be no question, however, as to the propriety of joining the guardian and his sureties as defendants to a bill for an account and decree in this State; nor is there any doubt as to the jurisdiction of the court of equity in the premises. 8 Fla., 77, 153; 3 Black., 141-2; 2 Story's Eq., 585; 15 Fla., 38.

Defendant Hampson filed no answer.

The other defendants, in their answer, admit the appointment of Hampson as guardian, and his and their execution of the bond. They neither admit nor deny the receipt of the moneys by the guardian, and demand proof of the same. They state upon information and belief that a portion of the money received by Hampson "was not the personal estate of said complainant, but was the distributive portion of the proceeds of certain real estate belonging to the estate of C. P. Knapp, deceased, the father of complainant, and that the same was not rightfully paid to the said Hampson as general guardian, and that his guardianship bond is not liable for the same."

Upon information and belief defendants further say, that Hampson, a short time after his ward reached his majority, did render him an account, that the amount due him was ascertained, and that complainant, without their knowledge, agreed to allow the amount due him to remain in Hampson's hands, with an agreement that Hampson should invest the amount due complainant in a farm in Texas; that complainant agreed to accompany Hampson to Texas and enter into a copartnership in farming, and that the money was so invested in pursuance of said agreement; that the said complainant went with the said Hampson to Texas in pursuance of said agreement, remained with him for several months and made no demand for his money until he became dissatisfied with the copartnership agreement; that the guardian has paid several large sums of money for and on account of his ward; that by agreement with

Hampson to take an interest in the land to be purchased in Texas, the complainant allowed Hampson to remove himself and his property from the State of Florida without accounting to the Probate Court and beyond its jurisdiction, binding himself by such agreement not to call the said Hampson to account before the said Probate Court; that Hampson at the time the complainant arrived at his majority was solvent, and abundantly able to pay the amount, if any, in his hands as guardian, and that he would have paid the same had complainant called upon him to do so, but that complainant suffered the same to remain in his hands and entered into an agreement with him, by virtue of which the said sum was invested in lands in the State of Texas for the benefit of complainant; that thereby the rights of defendants were prejudiced, and they were discharged from all obligation or liability upon the said bond.

There was an order taking the bill as confessed against Hampson, and an order of reference to a master to take an account of the moneys due in respect of the guardianship, to compound interest, if the testimony warranted it, to take deposition of witnesses as to the defences made, and to report.

It is unnecessary to state in detail the interrogatories addressed to the witnesses and their answers. The testimony is substantially as follows:

The defendant Hampson, the guardian, admits his appointment as guardian about May 30, 1872, and acknowledges that on August 1, 1872, he received certain sums of money from B. D. Wright, the executor of the will of complainant's father. The complainant being examined, admitted the receipt of certain sums from his guardian. Hampson, the guardian, further testifies, that of the sums received by him from the executor, $1,309.64 was not received in money; that at an executor's sale on the 26th of

December, A. D. 1870, he bought the homestead for $2,220; that he paid no cash; that amount was the portion of the estate coming to his wife as daughter of the testator and to the complainant; that no deed was made at that time, but that a deed was made to him on the 22d of August, 1872, that he occupied the house soon after the sale of 1870, and considered that he owned it, so far as his wife had an interest, and that he considered that the property was "deeded to him" by virtue of the purchase of 1870; and that at the time of the deed of August, 1872, he gave a receipt to the executor for $1,309.64, as the guardian of the complainant, that being the sum representing complainant's interest in the amount due on the purchase. A copy of the order of the Judge of Probate authorizing the sale of the homestead, as well as a copy of the deed made by the executor to Hampson, is in the record. The order authorizing the sale recites that a petition was the basis of the proceeding, but no copy of a petition is in this record.

The guardian, when asked whether he had an agreement with complainant that he should invest this money as guardian in a farm in Texas and go into partnership, says "we had no agreement; we had conversations about it before going out there; I was to wait out there for him to come out and see how it suited him, when he would decide about the partnership; I invested money in Texas sometime in April, 1874, on my own responsibility; after I bought the place in Texas I thought I would still have money enough to settle up with him; after I had made the investment the complainant sent me a telegram; I think it is the one offered in evidence; I enclosed it in a letter to R. L. Campbell on February 19, 1876; I sent money to complainant in response to the telegram; he went to Texas with my family; I removed my family to Texas in May, 1874, having sold my property in Pensacola before leaving; the sale of my property in Pensacola and my investment in Texas was not in

consequence of an understanding with complainant that his money should be invested there; I had no agreement with him as to my going to Texas; we had conversations about it, but no agreement; I paid $500 for the farm, and had $2,200 left, believing that I had enough to pay him; the house cost me more than I expected, and I soon found that I had invested all my money; shortly after complainant's arrival in Texas he and I had a misunderstanding, and he never spoke to me about the farm; the farm was bought in my own name; I never conveyed or offered to convey any interest in it to complainant; he was in Texas about ten days or two weeks."

The complainant sworn says: "I became of age 22d of March, 1874; I was in Alabama; had been there about a year; I returned from Alabama sometime in March or April of that year; Hampson was at the time in Texas; after my return I did not see him until I went to Texas with his family; I never wrote to him agreeing to go into partnership with him in a farm in Texas; from the time that I went to Alabama to the time that I went to Texas, I met him but once, at the junction; I was not then of age; the conversation of which he speaks occurred before I went to Alabama; he spoke of going to different places; I wanted the money that I telegraphed for to settle my debts here before I left; about a week after I got to Texas I asked Mr. Hampson for a settlement; he offered to give me his note; I did not accept it, but left as soon as I could get my trunk ready; I did not say a word about a partnership while in Texas; the words 'in farm' I do not think were in the telegram I sent; I could swear that they were not; I did not mean by it that I would go into partnership with him; Hampson invested the money without my consent."

O. M. Avery, the Judge of Probate of Escambia county, swears: "I find in my office an account stating the amounts due to the heirs as well as creditors of the estate, showing a

balance still in the hands of the executor of $330.70, which he is ordered to pay to the heirs according to their distributive shares, dated May 21, 1873, also a final account. I find no special order directing the executor to pay over any amount of money to T. Jeff. Hampson as guardian of Chester P. Knapp. I find in the account the amount of $1,309.64 charged and purporting to have been paid by B. D. Wright to T. Jeff. Hampson, as guardian of Chester P. Knapp."

A copy of the receipt in evidence is as follows:

Received, Pensacola, August 1st, 1872, from Benj. D. Wright, as executor of the last will and testament of Chester P. Knapp, deceased, thirteen hundred and nine dollars and sixty-four cents, on account of the distributive share of Chester P. Knapp, Jr., in the estate of the said Chester P. Knapp, deceased.

T. JEFF. HAMPSON,
Guardian of C. P. Knapp, Jr.

There is also a like receipt dated May 23, 1873, for $82.67, "being in full settlement of Chester P. Knapp, Jr.'s, one fourth distributive share."

The telegram in evidence is as follows:

PENSACOLA, Fla., April 27, 1874.

Capt. J. Hampson:

Send three hundred twenty five dollars. Will go in with you in farm.

CHESTER P. KNAPP.

(Endorsed)—"Sent money to-day. Come on immediately."

There is in the record a copy of a conditional order of final discharge of the executor, and the executor in his accounts, credited himself with the amount of the receipts of

Hampson, the guardian. The following letter of the guardian to one of the defendants is in the record:

"McKINNEY, TEXAS, July 15, 1875.

Mr. Henry Pfeiffer:

DEAR SIR:—Yours dated June 30 is at hand and contents noted, and in answer would say that I was not aware of the fact that Chester Knapp had been trying to obtain money from you, as he had promised to wait on me until I could pay him, and I had no idea he would attempt to give you any trouble whatever. I am very sorry, indeed, Mr. Pfeiffer, that the matter has, or will cause you any trouble or expense, but rest assured that you or Mr. Sullivan shall not be out a dollar in the transaction. It was more to please Chester than myself that I bought this farm. He requested me to invest his money in land and he would stay with me and we would work the farm together, which if he had done, we would have made it pay very well. But he found that hard work did not agree with him and he hauled off and suddenly came to the conclusion that he did not like farming, and then he wanted me to give him the balance of the money that he claimed was due him, knowing at the time that I could not do so, as all of our money was invested in the farm. Times are very hard here and money scarce or I might raise the required amount by mortgaging my farm, but it would be impossible to do that now as money is not to be had at any rate of interest. I lost a great deal when my house and furniture was burnt up, and the drouth, in connection with the chintz bugs and grasshoppers, has ruined my crop. Had it not been for them I would have made a thousand dollars on my crop, but as it is now I will come out in debt instead. So you see just how I am situated. I would have answered this ere this, but your letter

laid in the office some time before I received it. Hoping we can fix up this affair without much trouble to you,

I remain, respectfully yours, J. HAMPSON."

There was a master's report and consequent decree against the guardian and his sureties. From this decree this appeal is taken. The ground upon which a reversal is sought is that the "court erred in rendering a decree against appellants, the sureties, on the guardianship bond."

There are strictly two general questions in this case:

First. Was the guardian properly chargeable with the moneys for which a decree is sought?

Second. If he was chargeable with these sums, has the complainant, the ward, so acted as to excuse his sureties from payment?

As to the first question:

The facts appearing from this testimony are that Hampson was appointed guardian of the complainant on the 30th of May, 1872, that he gave bond on that day with defendants Pfeiffer and Sullivan as sureties, conditioned that he should well and truly discharge his duties as guardian, keep all the property of his said ward, the same pay over and deliver when legally required so to do, and should make and render true and correct account of his guardianship in the form and manner prescribed, or that might thereafter be prescribed by law.

On the 26th of December, A. D. 1870, at an executor's sale of certain real estate, Hampson bid it in, but no deed was at that time made to him. Subsequently and after he had undertaken the trust of guardian of complainant, and after the execution of the bond, and on the 1st day of August, A. D. 1872, he receipted to the executor for the share of the proceeds of the sale coming to his ward, the executor took credit for the sum so receipted for in his account, charging them to Hampson as guardian, and executed to Hampson a deed for the property.

The first question arising in this connection is, was the principal, Hampson, properly chargeable with this sum in his accounts as guardian, and are his sureties accountable for its due payment and administration by him. So far as the answer is concerned, it neither admits nor denies the receipt of the moneys as alleged by plaintiff. Defendants simply demand proof of such receipt, alleging that a portion of the moneys received by Hampson was not the personal estate of said complainant, but was the distributive portion of the proceeds of certain real estate belonging to the estate of C. P. Knapp, and that the same was not rightfully paid to the said Hampson, as general guardian, and that his guardinship bond is not liable. There can be no doubt that the guardian of an infant is the proper person to whom to pay the distributive portion of the proceeds of the sale of the real estate of the deceased testator. It is property of the infant, covered by the bond, which the guardian is entitled to receive, and for which he must account. In this case the payment is approved by the court, the court having granted a discharge where the executor entered a credit in his accounts, and if there is not some substantial legal objection, arising from the fact that there was not an actual change of money between the executor and the guardian, then the guardian was properly chargeable and the sureties are responsible for the due performance of his trust in respect thereto. (1 John Chy., 3; 106 Mass., 586; 9 Vmt., 41; 3 Pick., 213; 2 Wms. Extrs., 1,405, 7th Ed.; 2 McCord, 55.)

There being nothing in the nature of the property to exempt the guardian from liability, the next question is, was the simple receipting for the money without its actual receipt, first by the executor and again by the guardian, sufficient to charge the guardian. There is here no charge of fraud upon the part of any one, and the only objection that can be urged is simply that there was no actual transfer

of money. The result of the transaction here was that Hampson became indebted to himself as guardian for the amount of the distributive share coming to his ward. In the case of Moore and Montford,. Extrs. vs. Felkel and wife *et al.*, 7 Fla., 75, we have presented the case of a party occupying two relations, that of administrator and guardian. There was no actual transfer of funds to the guardian, and in treating of the subject and in disposing of the case, this court there said that the party's "account as administrator, and the balance against him as such, forms the extent of his liability, and all his liability to his ward."

This court then remark: "In reference to all this we find the law laid down to this effect: 'A. was appointed the guardian of Mrs. W., when she was an infant, and the necessary consequence of this was that the amount in his hands to which she was entitled as distributee of her mother, became so much held in trust for her as her guardian.'" There was here no actual receipt as guardian, but the court charged him with the balance in his hands as executor. (See also 2 Fla., 327.) In speaking of a like subject, Chancellor Harper, for the Court of Appeals of South Carolina, (1 McMullen, 497,) says, "I suppose, if an administrator have in his hands the balance of an estate and is afterwards appointed the guardian of infants entitled to the estate, he will be chargeable as guardian, and the sureties to his guardianship bond will be liable. *Or if in any other capacity he be indebted to himself as guardian, being unable to sue himself, the debt shall be presumed to be paid, and he and his sureties will be liable.*" (See also 1 Bail. Eq., 338; 2 Ibid., 203; 44 Md., 504; Thomp. Dig., 201, §6.

There is here, so far as we can see, no escape from the conclusion that for this debt of Hampson to himself as guardian the sureties upon his bond are responsible. The act of receipting to the executor for the sum due his ward was an act as guardian, and his appropriation of his

own debt and the failure to pay sums due by himself was a conversion, an appropriation, a breach of trust, for which his sureties were responsible, unless the ward has done something to release them. This is the only remaining defense interposed by the answer.

It is unnecessary to reiterate here at length the testimony. The claim made by the sureties is that complainant, after arriving at his majority, entered into a co-partnership with his guardian and that by his, the ward's instructions, the money received by him, the guardian, was invested in a farm in Texas.

The testimony relating to this subject is substantially as follows:

The guardian testifies we had no agreement; we had conversations about investments of money in land before going out to Texas; I was to wait out there for him, when he would decide about the partnership; I invested money in Texas sometime in April, 1874, on my own responsibility; the sale of my property in Pensacola and my investment in Texas was not in consequence of an understanding with complainant that his money should be invested there.

The complainant states that he became of age the 22nd March, 1874; that the conversations of which his guardian speaks as to an investment of money in land in Texas occurred when he was a minor; that he had been in Alabama sometime before his guardian removed to Texas; that in March or April, 1874, he returned to Pensacola; that his guardian had gone to Texas; that he never wrote to him agreeing to go into partnership with him in a farm in Texas; that he went to Texas with his guardian's family; that he said nothing about any partnership while there; that about a week after he got to Texas he asked his guardian for a settlement; that Hampson offered him his note;

that he did not accept it but left as soon as he could get his trunk ready.

So far as this testimony is concerned, it certainly does not establish the defense insisted on by defendants. On the contrary, nothing beyond conversations between guardian and ward, during the minority of the ward, as to investment in land in Texas is established. At the time that the guardian removed to Texas the ward was in another State and was a minor.

As to the telegram of the ward and the letter of the guardian to Mr. Pfeiffer. Independent of any questions as to the admissibility of either as evidence as they were presented, we cannot see, considered with reference to the other positive testimony under oath, that they establish the defense, and the burden of proof as to this matter was upon the defendants. It may be admitted that such a telegram was sent, or that such proposition as it contains was made to the guardian after he went to Texas, and it does not make a case for the defense.

The testimony of each witness, giving it its most liberal construction, is to the effect that nothing more than a proposition was made. No terms were agreed upon, no transfer of any interest had, and nothing in the shape of a settlement transpired. The letter is from the guardian to one of his sureties. The ward is in no way connected with it. In this letter the guardian states to the surety that the ward had promised to wait on him until he could pay him; that he bought the farm more to please his ward than himself; that he requested him to invest the money in land and work the farm together, but that he, the ward, "hauled off and suddenly came to the conclusion that he did not like farming, and then he wanted the balance of the money." Looking to the testimony of this witness, it is evident that the minor's request to invest the money in land was made during his minority. If it be not so, then this witness

swears falsely as to what happened upon the ward's visit to Texas, for his statement as to what then happened is inconsistent with it. He says in his testimony that Chester (the plaintiff) did not consent to go in with him in the farm after he got to Texas. "He and I had a misunderstanding shortly after his arrival, and he never spoke to me about it that I remember." He writes in the letter that the ward wanted the balance of the money, and from the letter, which bears date July 15, 1875, we see that complainant before that time is "trying to obtain money from one of the defendants."

Controlled by the rules of evidence applicable to proof of defenses of this character in an answer, we think that no partnership is established; that no binding agreement as to any investment in land is shown, and that there is nothing as to what happened in this matter to excuse the sureties upon the bond.

The short delay to institute suit in this case does not relieve the surety. Even upon a simple contract of suretyship independent of express conditions, such as are stated in this bond, mere indulgence at the will of the creditor extended to the debtor in no way discharges the obligations of the surety. It is a settled rule that there must be a valid common law agreement to give time, founded of course on a good consideration, to have this effect. (5 How., 207; 2 Ran., 328; 1 Leigh, 435; 12 Wheat., 554; 44 Ind., 67.) What we have said disposes of all questions arising strictly from the pleadings in this case.

It is urged in brief that the guardian had no authority to receive or receipt for the estate until an order determining the distributive share of the estate is made. The defendants in their answer admit that the sum received by the guardian "was the distributive portion of the proceeds of certain real estate belonging to C. P. Knapp." The receipt of the guardian is on account of the "distributive share of

Chester P. Knapp," and the order of the court in the matter of the account of the executor treats the fund as the distributive share of the ward.

This is no action upon the bond of an administrator by a legatee or distributee. (1 Fla., 242; 5 Pick., 61; 5 N. H., 68; 13 Vmt., 135; 34 Minn., 372; 1 Murf., 1; 1 Wall., 335.) This suit is in chancery for an account, and it is not necessary to show that there has been an account in the Probate Court fixing the balance due.

The ward can seek a court of equity for the purpose of an account and a consequent decree. This is the rule except where the bond and the statute regulating the duty of the guardian is otherwise. We have in this State no such statute. The appellants *insist* that the record of the Probate Court does not show the authority of the executor to make the deed to Hampson; that it does not disclose whether any petition was filed, nor does it show upon its face jurisdiction of the subject matter or the parties.

No such question as this was in issue under the pleadings. The defendants, as we have before stated, admit in their answer that the amount which is in question here was "the distributive portion of the proceeds of certain real estate belonging to the estate of C. P. Knapp, deceased, the father of complainant."

The only issue in these pleadings to which this partial record of the proceedings of the Probate Court was applicable, was the amount of money, the distributive share coming to the minor and received by the guardian. This record, it may be remarked, recites the filing of the petition. Where no such question is in issue, we cannot presume, in the absence of this petition, that it did not contain a recital of the jurisdictional facts.

The part of the recital here introduced was simply to show how and in what relation the guardian was chargeable with this money as well as its amount. It was admis-

sible as evidence of these facts. No question as to the validity of the sale of the land arises in this case.

The decree is affirmed.

REUBEN HAYNES, APPELLANT, VS. EDMOND MCGEEHEE ET UX., APPELLEES.

A landlord has no ground to maintain a bill in equity praying that personal property (crops), claimed by the tenant to be exempt from levy and sale, may be declared not to be so exempt, and that it be sold to satisfy rent and supplies furnished, there being no specific lien requiring the aid of a court of equity to enforce it, and no statute authorizing a proceeding in equity to determine the question of the exemption of personal property. The remedies at law are complete and adequate.

Appeal from the Circuit Court for Madison county.

Appellant filed his bill in equity against appellees alleging that in January, 1878, he leased to them thirty-six acres of land and put them in possession, under an agreement by parol that they should give him a "rent note" therefor at the rate of two dollars per acre. They afterwards, on demand, refused to give the "rent note," but continued in possession and raised a crop of corn, cotton, &c. He also alleges that he furnished supplies to them to enable them to raise the crop, to the amount of twenty-four dollars. It is also alleged that the rent is due at the time of filing the bill and appellees refuse to pay, and have secretly and fraudulently removed a portion of the crop from the place, and he believes they will fraudulently dispose of it unless restrained. He further alleges that he sued out a distress warrant for the purpose of distraining upon the crop, but the officer having the writ having been notified

by defendants that they claimed all the crops as exempt from seizure under the homestead and exemption laws, and therefore did not levy.

A copy of the appellees' affidavit, inventory of personal property and claim of exemption, filed and recorded in the office of the County Judge, is filed as an exhibit.

The bill prays that a decree may be made declaring that the cotton, corn, &c., raised on the land are not exempt from levy, but are subject to be seized and sold for the rent and supplies, and that they be sold and the proceeds applied to that purpose.

The defendants demurred to the bill, upon the ground that complainant does not show a case entitling him to relief in a court of equity. The court decreed in favor of defendants and dismissed the bill, from which decree complainant appealed, and now seeks to reverse it, upon the following grounds:

1st. Because a landlord has a lien, for rent, on the crops grown, of superior dignity to all others, and not subject to the claim of exemption.

2d. Because rent is a debt of a superior nature, issuing out of the realty, it is purchase-money, and a lien, therefore cannot be defeated by a claim of exemption.

3. Because supplies are purchase-money, and constitute a lien upon the crops.

F. W. Pope for Appellant.

D. W. C. Willis for Appellees.

THE CHIEF-JUSTICE delivered the opinion of the court.

Upon the allegations in the bill it is plain that the complainant has mistaken his remedy. At the common law the landlord's claim for rent is deemed superior to any other demand, and he was, therefore, given his remedy by

distress of the goods of the tenant, without resort to the courts for judgment and execution. His other right is to sue in the courts of law for use and occupation, or for the agreed rent. He has no standing in a court of equity for the purpose of compelling the payment out of any particular property, unless he has such specific lien by mortgage or otherwise as to render a resort to chancery necessary to foreclose it. Without this specific lien exists, the remedy at law is simple and ample. If the landlord distrain or levy upon the property of his tenant for rent, the question of the exemption from levy may be tried by an action of replevin, or in case or trespass for the wrongful seizure. If no such action be brought, the landlord is not prevented from making his money.

It is unnecessary here to examine the effect of the statutes in respect to the rights and remdies of landlords and tenants, because none of them contemplate proceedings in equity, except where a lien exists in the nature of a mortgage duly executed as required by such statutes.

The suggestion that the claim for rent and supplies furnished is equivalent to a demand for purchase-money and therefore may be enforced in equity, even if it was correct as to the character of the claim, is not so as to the remedy. The equitable remedies for the enforcement of liens for purchase money apply only to real property.

The appellant bases his right to file this bill upon the provision of section 9 of the act of 1869, (Chap. 1715,) providing for setting apart a homestead and personal property to be exempted from forced sale. That section has exclusive reference to real estate claimed as a homestead, and authorizes the court to hear and determine the rights of the parties according to the rules and practice of the court of chancery where the creditor claims that any part of the real estate claimed as exempt is not exempt within the meaning of the law. The 7th and 8th sections of the act

provide a method of ascertaining what personal property is exempt.

The party here having an adequate and complete remedy at law, and there being no statute authorizing a resort to a court of equity for the relief prayed, the demurrer was properly sustained and the bill dismissed. (See Bryan vs. Long, 14 Fla.)

The decree is affirmed with costs.

THE TRUSTEES OF THE WYLLY ACADEMY, APPELLANTS, VS. HENRY S. SANFORD ET ALS., APPELLEES.

1. Under the statutes of 1868 and 1877, providing liens in behalf of mechanics, laborers, material-men and others, for work and materials employed in erecting buildings, where a contractor employs the labor and furnishes the materials used in the erection of a building under an agreement with the owner to complete the same for a stipulated price, the extent of the liens is the amount due from the owner at the time of giving the notice of lien required by law.

2. Where several liens are duly established under the acts of 1868 and 1877 by laborers and material-men for labor and materials furnished to a contractor in the erection of a building, and such aggregate liens amount to more than is due the contractor from the owner at the time of the service of notice to the owner that a lien is claimed under the statute, a court of equity, upon bill filed by the owner, may decree a discharge of the several liens upon payment into its registry of the amount actually due from the owner to the contractor at the time of such notice and the costs incurred in establishing the liens.

3. A bill filed by the owner of the property against which several liens are established, in which the several lien creditors are made defendants, for the purpose of obtaining a discharge of the liens by payment into court of the amount due the contractor on his contract for buildings is not multifarious.

Appeal from the Circuit Court for Orange county.

The facts of the case are stated in the opinion of the court.

J. Wofford Tucker and *David S. Walker, Sr.*, for Appellants.

E. K. Foster for Appellee Sanford.

THE CHIEF-JUSTICE delivered the opinion of the court.

Appellants filed their bill in equity against the appellees alleging that a certain lot of land had been donated and conveyed to certain persons who afterwards became the corporators, under the name of the appellants, as a corporation duly organized under the laws of this State; that the said land had been conveyed to them in trust for the purpose of establishing thereon a high school and town hall at Fort Reid in Orange county; that the said trustees, pursuant to the purposes of the donation, contracted with W. R. Roberts, a carpenter, to furnish materials and erect on said lot a school building, which contract was in writing and signed by the trustees and Roberts, for the sum of sixteen hundred dollars, to be fully paid on the completion and acceptance of the building; that payments were made to Roberts on account of the building as work progressed to the amount of $956.21, when notices were served on the trustees and the corporate board of sundry liens claimed upon the building for debts contracted by the said Roberts on account of the building; that suits were brought after appellants took possession of the building, and liens have been duly established against it by judgments duly entered. That H. S. Sanford brought his suit for materials furnished to Roberts, the contractor, against the trustees directly for the purpose of establishing a lien upon the building, and obtained a judgment. The amount of the several liens

thus established, and the names of the persons obtaining the judgments which had become liens, are set out in a schedule annexed and referred to in the bill, as follows:

W. C. Ralphs (principal), $215.25; A. D. Stentiford, $76.60; W. F. Warren, $49.37; W. D. Freeman, $33.00; John Willy, $18.00; H. S. Sanford, $627.50; D. C. Savage, $21.00; amounting in all to $1,040.72, besides some small claims not secured by lien amounting to $95.96.

The contract for the completion of the building called for $1,600, and the amount paid the contractor before notice of lien was $956.21, leaving unpaid upon the contract $643.79.

Although the bill is not very skillfully drawn, yet it substantially presents the facts above collated.

The bill thus shows that the liens for claims for lumber, materials, &c., established by judgments, were largely in excess of the amount due upon the builder's contract, and insists that it is not consonant with the legal or equitable rights of the parties that the owners of the building shall be made to pay more than the contract price therefor, and complainants ask that the defendants, the leinors, be restrained from collecting more than the amount due the builder at the time of notice of the unpaid claims; that it be referred to a master to inquire and report as to the liens and the amounts due to the several creditors thereon; and that complainants have leave to pay into the registry of the court the amount so found due in satisfaction of the several liens against the property, and for general relief.

The defendant Sanford demurred upon the grounds.

1. That there was no equity in the bill as to Sanford.

2. That the bill was multifarious, in that it presented matters to which Sanford was a stranger, and in which he was not interested.

The court entered an order sustaining the demurrer and

the complainants appealed, and allege that the court erred in sustaining the demurrer.

The questions presented by the record are, whether, upon the case stated in the bill, the appellants are entitled to the relief prayed, and whether the bill is multifarious.

It is assumed upon the general allegations of the bill that the several liens referred to were established according to law, this being expressly stated in the bill. The question then arises, whether the complainants' building against which the liens are alleged to exist, is liable to be sold to pay the whole amount of the several liens, or only the amount due from complainants to the contractor at the time of notice of the claims?

Liens of mechanics, laborers, material-men and others, for work and materials employed in the construction of buildings, are created and regulated by statute. The acts of the Legislature of this State, relating to the questions here presented, are the act of 1868, Ch. 1632, and the act of 1877, Ch. 3042, being acts to enforce this class of liens. These acts expressly repeal all former acts inconsistent with them. [The act of Feb. 8, 1861, Chap. 1125, is not considered in determining this case.]

They (the acts of 1868 and 1877,) provide that mechanics and all other persons performing labor or furnishing materials for the construction or repair of any building, or for machinery, &c., may have a lien separately or jointly upon the building, &c., for which they have furnished materials of any kind, and on the interest of the owner in the lot or land on which it stands, to the extent of the value of any labor done, or materials furnished, or for both. The third section of the act of 1868, as amended in 1877, provides that any such contractor, journeyman, or laborer employed in the construction or repair or furnishing materials for any building, mill, &c., may give notice to the owner thereof in writing, setting forth the amount of his claim,

and that he holds the owner responsible for the same, and the owner shall then be liable for such claim to the extent of the amount due from him to the employer at the time of notice, which may be recovered in action.

Section 4 prescribes the time and manner of filing and recording the notice of lien in the clerk's office.

Section 5 authorizes any person having such lien to bring suit to enforce it within a certain time named.

The 6th section provides that in such actions all issues shall be made up and trials had as in other cases, and the court may, by the judgment, direct a sale of the lands and buildings for the satisfaction of the lien and costs, and such sale to be without prejudice to the rights of any prior incumbrancer, owner or other persons not parties to the action.

The position of the appellants is correct, that in the absence of any fraud in the original contract or in the amount of payments made to the contractor at the time of notice of the lien mentioned in the third section, the owner or the building or lot cannot be legally or equitably liable to pay more in satisfaction of the liens than the amount due from the owner on the contract to the contractor. It is true the first section makes the property liable to the extent of the value of labor and material furnished, but this is qualified and limited by the third section to the amount due the contractor at the time of notice of lien, and the *lien* is therefore limited to that amount without regard to the amount due the laborer, mechanic or material-man from the contractor.

By the 6th section the court is directed to enter judgment and "direct a sale of the lands and buildings for the satisfaction of the lien and costs," such sale to be without prejudice to the rights of prior incumbrancers or others who are not parties to the suit.

The 7th section of the act of 1868 provided that when sev-

eral claims had been filed and recorded against the same property, they should be satisfied in the order of priority of suits and judgments, but this was repealed by the act of 1877.

By the 6th section of the act of 1868, all persons whose liens were recorded might be made parties in the suit to enforce liens, but this provision was also repealed in 1877, and we find no authority under the law as it stands for joining several lienors as parties in a suit at law to enforce such lien. Each claimant therefore may maintain his separate action for that purpose, and it is not practicable in any such suit to ascertain what amount of such liens may be due to any other than the plaintiff in each suit. It follows then that the remedy of the owner of the property, in case the several lien judgments amount to a greater sum than the amount due from the owner at the time the liens, attached, must go into a court having jurisdiction to inquire into the equities of the parties, to array the several liens and liabilities and to adjust them.

In the present case, the amount of the several liens already in judgment, according to the allegations of the bill, is between ten and eleven hundred dollars, while the amount due from the owner to the contractor was less than six hundred and fifty dollars.

It could not have been the intention of the law to compel the owner of the land to pay more than the price contracted to be paid for the erection of buildings upon it, there being no fraud or concealment as to the contract or payments.

The third section operates as a qualification of the first in respect to the extent of the lien, as fully as though it was annexed to it as a proviso. Any other construction would compel the owner to pay all the laborers and material-men the whole amount of their claims, amounting, perhaps, to the entire contract price, after having paid his

contractor the entire agreed amount and the full value of the building. The patent object of the proviso was to avoid such an unconscionable result.

The several liens having been established, according to the bill, and being in the aggregate so largely in excess of the actual liability of the owners, they must either submit to a great wrong or seek the only remedy at their hands, an adjudication of the amount for which their property is actually liable to the several lien creditors, and the subjecting of it to sale unless sooner satisfied by payment of the amount and the costs of the respective liens into the registry of the court. It is not apparent that the owners have any other means of saving their property from sacrifice, and the court has ample power to ascertain priorities, if any, of the creditors, and to distribute the fund equitably among them.

The question of multifariousness, raised by the demurrer, is fully answered by the foregoing statement of the position of the parties. The defendants are each interested in the common fund to which they all look for such share as they may be severally entitled to, and substantial justice cannot be administered unless all such creditors are made parties.

The demurrer of the defendant Sanford should have been overruled.

The decree sustaining the demurrer is reversed and the cause is remanded with directions that complainants may perfect service upon such of the defendants as have not been served with process or appeared, if they desire to do so; that the parties have leave to amend the pleadings as they may be advised, and that such other proceedings may be had as may be agreeable to equity.

P. H. YOUNG, APPELLANT, VS. G. P. THOMAS, COLLECTOR OF REVENUE, APPELLEE.

Under the Constitution of the State of Florida, the Legislature has the power to levy a license or occupational tax upon lawyers.

Appeal from the Circuit Court for Alachua county.

The Plaintiff, P. H. Young, brought his bill in the Circuit Court of the State of Florida for the Fifth Judicial Circuit in Alachua county, alleging that he had been "duly admitted an attorney and counsellor at law" to practice law in the courts of the State, and that he had practiced law as such attorney for more than six years past, and that he is at this time a member of the bar and practicing attorney; that he is the owner of certain real estate described in the bill; that defendant, Thomas, as Collector of Revenue for Alachua county, has levied upon said lands for the enforcement and collection of a special license tax assessed against him upon his avocation and profession as an "attorney or lawyer," and is about to advertise and sell said lands for the enforcement of said tax, and that he will so sell said lands unless restrained by order of this court. Plaintiff alleges that such tax is "illegal and unconstitutional," and in derogation of his vested rights as such attorney under the Constitution and laws of the State of Florida. Plaintiff prays an injunction restraining the threatened acts of the collector and for a decree vacating the levy made and declaring the tax illegal.

Upon bill filed after notice of application to the collector, the court denied the motion for injunction and dismissed the bill. From this order the appeal is taken. The record was filed in this court on the 31st December, A. D. 1878, and now, upon motion of the Attorney-General, the case is docketed and heard.

B. H. Thrasher, King and Taylor, for Appellant.

The Attorney-General for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In the absence of a petition of appeal in this case, we must look for the grounds upon which a reversal is sought to the bill filed. If it states distinctly the grounds upon which the equity sought to be enforced is claimed to exist, and properly presents the questions involved as arising out of the facts stated, no injustice can be done in treating the question as there presented by the plaintiff.

No question as to whether the matter presented is the subject of equitable jurisdiction is raised by either party. The question presented by the case as stated is, has the Legislature the power to tax the pursuit, the avocation of a "lawyer," notwithstanding his previous admission to practice in the several courts of this State under the statutes of this State regulating that subject.

The appellant claims that such a tax is unconstitutional, and in derogation of his vested rights as an attorney.

The solution of this question involves the consideration of two general subjects:

First, The nature and extent of the power of taxation, it being clear that the power to tax, in so far as it exists, is in the Legislative department of the government.

Second, Is the avocation of an attorney a pursuit or business the following of which may be made the subject of a special license tax in this State? Is the imposition of such tax within the power of the Legislative department of the government of this State as properly defined? The power to tax is legislative in its character. It in no sense belongs to either the Executive or Judicial departments of the government. This power in the Legislature is unrestrict-

ed, except where it meets an organic limitation; such limitation must be found either in the Constitution of the United States or of this State, and must be by virtue of an express limitation to that effect, or must be clearly and plainly implied from some provision of the Federal or State Constitution.

The power to tax is one of the essential elements of sovereignty, much more essential, if such a comparison can be made, than the power to punish crime, to regulate descents, or other like admitted subjects of legislative action.

Chief Justice Marshall says this power is an incident of sovereignty, that it is co-extensive with that to which it is incident; that all subjects over which the sovereign power of a State extends are objects of it, and that the only security against its abuse is the power of the constituents upon whom it acts. (4 Wheat., 428-9.)

Thus disposing of this question, for we see no necessity for saying more in reference to it, we reach the only remaining question involved in the case. That question is: Is the avocation of an attorney a pursuit or business, the following of which may be made the subject of a special license tax in this State. Is there any such limitation upon the general power of taxation vested in the Legislature as prohibits such legislative action?

The only provisions relating specially to taxation, under which we conceive a claim of exemption can be founded, are Sections 1 and 6 of Article XII.

Section 1 of Article XII. is as follows:

"The Legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such property as may be exempted by law for municipal, educational, literary, scientific, religious or charitable purposes." Section 6, after limiting the purposes for which counties and towns may levy a tax, and

prescribing the rule of taxation, authorizes the Legislature to provide for levying a special capitation tax and "tax on licenses."

The limitations contained in the first section do not refer to the occupation or business of an attorney. The uniform ruling of the courts, so far as we have been able to ascertain, is that the term property as used in this section does not include a business calling or occupation as distinct from the property or capital employed in it. (49 Ga., 200; 42 Ga., 596.) We presume no claim of a serious character will be made to exemption under the limitations of this clause, and we therefore proceed to the consideration of the clause in section six. Construing that clause literally, its effect would be to authorize the levying of a tax upon licenses granted, and if an attorney belongs to a class who exercises his avocation under and by virtue of a license, his occupation would be included within its terms. This, however, we do not think is the proper construction. License fees or amounts required to be paid to follow any particular employment are levied for two purposes, viz: for revenue, and as a means of controlling or limiting the exercise of some particular avocation, in other words, as a police regulation. We think the purpose of the framers of the Constitution was by this clause to vest in the Legislature, by a specific and express grant, independent of or in addition to its general power to tax, the power to tax any avocation or business by way of requiring a license tax for its exercise. So far as this clause is concerned, we think the Legislature unrestricted in its power to tax by way of license fees, and that it may so tax either as a police regulation to restrain any particular pursuit or for the purposes of revenue.

The plaintiff in this case insists in his bill that the levy of this tax is in derogation of his vested rights as an attorney.

In the language of the Court of Appeals of Virginia, (23 Grattan, 469-470,) "a lawyer's license authorizes him to practice law in any court of the commonwealth. It is a vested civil right, yet it is as properly a legitimate subject of taxation as property to which a man has a vested right. I cannot perceive that there would not be as much reason for saying that a man's property was not taxable because he has a vested right to it, as for saying that a lawyer's license is not taxable because he has a vested right to it."

The matter of regulating the admission of persons to practice law is the subject of legislative action and control. At common law the courts had no power to admit attorneys or counsellors. (12 Fla., 281.) Their duties are of such character that in order to secure proper qualification for their discharge the Legislature imposes the duty of examination and determination upon the courts. The only difference between this pursuit and that of any other for which a license is required, is that a qualification looking to competency is required in one, and the right independent of qualification is in the other. Because the law prescribes certain methods by which the existence of the qualification to follow a pursuit is determined, and after determining their existence a general authority to follow such pursuit is granted, gives no greater right to follow that pursuit than exists in any citizen to follow any other legitimate calling or avocation. There is a general right in every citizen to acquire, possess and protect property, and yet in the absence of such constitutional limitation upon the power of taxation, it extends, as is said by Mr. Justice Cooley, "to every trade or occupation, to every object of industry, use or enjoyment, and to every species of possession." The power of the Legislature to impose a license tax upon lawyers is affirmed in the following cases: 21

La. An., 201; 12 Mo., 268; 49 Miss., 749; 23 Grat., 464; 44 Ala., 658.

The decree of the Circuit Court is affirmed.

JONATHAN C. GREELEY, APPELLANT, VS. THE CITY OF JACKSONVILLE AND ROY P. MOODY, TAX COLLECTOR, APPELLEES.

1. The City of Jacksonville has, under its charter, the power to issue bonds for municipal purposes. The drainage of creeks, swamps and ponds around the city, the laying of streets, and the construction of sewers and water-works, are methods by which the health, convenience and comfort of the residents of the city are directly affected, and are municipal purposes.

2. Neither the Constitution of this State, nor the charter of the city of Jacksonville, prescribe any particular form in which the amendment or repeal of an ordinance is to be had. To the extent that the provisions of a subsequent ordinance are plainly in conflict with a former one, the former is repealed by implication.

3. As against a *bona fide* holder for valuable consideration of bonds of the character authorized by the charter of the city of Jacksonville, and the action of its council to be issued in this case, irregularities in the matter of giving notice of the election authorizing their issue are not available, nor is the fact that an extended record of the ordinance authorizing such bonds was not made at the time effective to relieve the city of its obligations, even in a direct proceeding against such issue before the bonds reach the hands of a *bona fide* holder for value. If it appears that such action was taken by the city it is sufficient.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

James M. Baker for Appellant.

E. M. Cheney for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

Jonathan C. Greeley, a tax-payer and owner of property in the city of Jacksonville, brought his bill in the Circuit Court of the Fourth Judicial Circuit, in Duval county, alleging that the said city had caused an issue of its bonds to be made in an illegal manner; that no record of the proceedings authorizing the issue of the bonds was made at the time they were had; that a part of said bonds have been sold and have gone into the possession of *bona fide* purchasers for valuable consideration; that the said city had caused a tax to be assessed upon his property for the payment of the interest and sinking fund obligations purporting to be created by said bonds, and that the Collector of Taxes of said city was proceeding to collect said illegal tax. The plaintiff in his bill prayed for a decree establishing the illegality of the bonds and an injunction restraining the collection of the tax levied.

The defendants filed their answer setting up the circumstances under which the issue of said bonds was had, reciting at length the powers of the city under its charter, as well as the circumstances of their issue by the city.

After hearing upon the bill and answer, the court declined to grant the injunction and directed the dismissal of the bill.

The general question presented here for consideration is, what are the powers of the city of Jacksonville in the matter of issuing these bonds.

Under the general act providing for the incorporation of cities and towns in this State as amended, which was the organic law of this municipal corporation at the time of

the issue of these bonds, the city of Jacksonville had authority to issue bonds for municipal purpses, after submitting the question to the qualified electors of the city, in such manner and after such public notice as might be deemed necessary by the city council, provided two-thirds of the votes actually cast by the electors be in favor of issuing the bonds and the amount proposed to be issued.

It is admitted that the bonds in question were issued for the purpose of carrying out sanitary improvements by the drainage and reclamation of creeks, swamps and ponds around the city, laying off streets and constructing sewers and water-works.

The plaintiff does not here deny that these are municipal purposes. We think they are. Each named purpose looks either to the health or convenience of the residents of the city. All of the named ends to be accomplished are for their comfort, prosperity and welfare, and are direct methods by which these ends may be accomplished.

It is not here denied by plaintiff that an election was held, and that two-thirds of the votes actually cast at the election were in favor of the issue of bonds. The only question raised by the pleadings is, was the notice of the election given in conformity to the ordinances of the city regulating the issue of the bonds for the payment of the interest upon which this tax was levied? The plaintiff admits in his pleading that three days notice, by published proclamation of the mayor calling the election, was given, but insists that under the ordinances of the city five days notice was required. A consideration of the two ordinances covering the subject must determine this question.

The first ordinance relating to the subject was entitled "An ordinance to provide for the issue of bonds for sanitary improvements," and was approved December 28, A. D., 1877. Sections one and two of this ordinance are all of the sections necessary to be considered, as it is from

their provisions that the question stated arises. These sections are as follows:

"Sec. 1. That the mayor is hereby directed to issue his proclamation calling an election to be held by the qualified electors of the city of Jacksonville, according to the last registration, to determine whether or not the city council shall be authorized to issue bonds of the city of Jacksonville for an amount not to exceed fifty thousand dollars, said bonds to be of such denominations, to be payable at such time and place, to bear such rate of interest, to be subject to such conditions and to be applied to such purposes as are hereinafter designated."

"Sec. 2. That said election shall be held on the 15th day of January, A. D., 1878, at such polling places in the several wards of the city of Jacksonville, and under the supervision of such inspectors of election as may be hereafter designated by the city council, public notice thereof to be given at least five days previous to said election, and at said election all those voting in favor of bonding, as aforesaid, shall deposit ballots, on which shall be written or printed the words 'For Bonds,' and all those opposed thereto shall deposit ballots on which shall be written or printed the words 'Against Bonds.'"

On the 29th of December, A. D. 1877, the mayor, under this ordinance, issued his proclamation calling an election on the 15th day of January, A. D. 1878. Before such election was held, and on the 11th day of January, A. D. 1878, another ordinance on the subject of issuing bonds for municipal purposes was passed amending.

To show the question raised by the pleadings here, it is only necessary to insert section one of said ordinance. The title of this ordinance and its first section were as follows:

"An ordinance to be entitled an ordinance to amend an ordinance entitled 'An ordinance to provide for the issue

of bonds for sanitary improvements,' approved December 28, 1877."

"*Be it ordained by the City Council of the city of Jacksonville*: SECTION 1. That section 1 of said ordinance be and is hereby amended so as to read as follows:

"Sec. 1. That the mayor is hereby directed to issue his proclamation calling an election to be held by the qualified electors of the city of Jacksonville on the 15th day of January inst., to determine whether or not the city council shall be authorized to issue bonds of the city of Jacksonville for any amount not to exceed two hundred and fifty thousand dollars; said bonds to be of such denominations, to be payable at such time and place, to bear such rate of interest, to be subject to such conditions and to be applied to such purposes as are hereinafter designated."

The second section of this ordinance amends the third section of the ordinance of December 28, 1877.

The second section of the ordinance of December 28, 1877, is nowhere amended or changed in express terms, but it is clear and plain that the requirement of five days notice of election in that section is inconsistent with the requirement of the first section of the amendatory ordinance, as from the date of its passage and approval to the time at which the election was to be held, five days did not intervene.

The question is, did the first section of the amendatory ordinance repeal the requirement of five days notice in the first, and was the notice of three days sufficient?

Upon this subject there is nothing in the Constitution of this State, or in the organic law of this municipal corporation, its charter, which prescribes any particular method by which the legislative power delegated to this council is to be exercised in the matter of the form in which the amendment or repeal of antecedent ordinances is to be had. To the extent that there is a plain conflict between this last

exercise of power and the prior ordinance, the former must cease to be operative. Where such a clear conflict exists, as in this case, the repeal by implication is as effective as if it is made in express words.

As to this question of notice, however, we do not think it is material whether such notice was given or not, when the rights of a *bona fide* holder for value of these bonds are concerned. Irregularities of this character in the exercise of a general power in a municipal corporation to issue bonds are not available as against an innocent *bona fide* holder for value.

In the case of the Commissioners of Knox County vs. Aspinwall *et al.*, (21 How., 544,) it was insisted that the requisite notice of the election had not been given, and that for this reason the vote was not in conformity with the law. The Supreme Court of the United States in that case remarked that while they will not say that there may not be a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties attached, but after the authority has been executed and the bonds issued and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. See also upon this general subject 1 Wall., 384, 175, 291, 292; 3 Wall., 654; 10 Wall., 676.

So far as the matter of failure to make a record of the proceedings of the council at the precise time of their occurrence is concerned, there is nothing in this to affect the validity of the bonds, even in a direct proceeding assailing them, before they reach the hands of a *bona fide* holder for value. This is but one evidence of the due passage of the ordinance in question. In this case no question is made of their adoption regularly and properly, and that is enough.

The decree is affirmed.

MARY W. CRAWFORD, APPELLANT, VS. JOHN T. CRAWFORD, APPELLEE.

1. A plaintiff, in alleging a ground for divorce, must, as a general rule, do something more than allege the ground in the words of the statute. He must allege the facts upon which his general charge is based in such manner as to apprise the defendant of the acts complained of, as well as in such manner that the court may judge whether, the facts alleged being proved, they will support the general charge.

2. It is essential to prove an intention to desert where the ground upon which a divorce is sought is wilful, obstinate and continued desertion. Continued separation between husband and wife which may be consistent under the proofs with no intention to wilfully and obstinately desert, is not a desertion within the meaning of the statute.

3. Indulgence in petulance, or the exhibiton of temporary capricious and unjustified irritation and temper, does not constitute, within the meaning of the statute, the habitual indulgence of a violent temper.

Appeal from the Circuit Court for Suwannee county.

The facts of the case are stated in the opinion of the court.

Angus Patterson for Appellant.

White & Bryson for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is a bill by respondent against appellant, seeking decree of divorce *a vinculo matrimonii*. The divorce is sought upon two grounds, viz.: wilful, obstinate and continued desertion, and the habitual indulgence of violent and ungovernable temper.

There was a decree of divorce *a vinculo matrimonii* as to

the husband, respondent here and the plaintiff below, and as to the wife, the appellant here and defendant below, the court decreed that it should not be lawful "for said defendant to intermarry with any other man so long as said complainant shall live."

From this decree defendant takes this appeal.

The first ground of appeal is that the bill is insufficient.

The bill simply alleges in general terms the statutory cause for divorce. We have repeatedly held this to be insufficient.

In addition to the general charge the plaintiff must specify leading facts, or at least some facts upon which the general charge is based. These facts must be so definitely alleged as to apprise the defendant of the nature of the facts to be proved to enable him to prepare his defence, as well as in order that the court may judge whether, the facts being proved, they will support the general charge. (13 Fla., 378; 19 Mo., 351; 4 Jones, 82; 19 Iowa, 34-36.)

We might dispose of this case upon this ground, but we think it proper to examine the evidence and state our general conclusions therefrom, as in the event a case coming within the statute is clearly shown, it is within the power of the court to remit the case, with such directions as would enable the plaintiff to put the facts in issue properly.

From a careful examination of the testimony it appears that the wife while sick left the house of the husband with his consent. It also appears that the husband, as he states himself, agreed to call for her and take her home when she "wanted to go home." He visits his wife a few times during her illness, and then leaves for Quitman, Ga. Upon his return he does not go immediately to his wife, and she, with her brother, goes to the house, as she states, to see him, and if the matters could not be arranged, to remove her little property to her mother's. During his absence in Quitman and while she was sick he states himself that he

never wrote to her, and that he had no communication with her after he went to Quitman, nor did he provide even the necessaries of life for her. As to what happened on the day of the removal, between her brother George and her husband, the testimony is very conflicting. The husband states that her brother threatened him with personal violence, and for this reason he did not go to see his wife, her brother living with her.

It is not necessary to reiterate the testimony of the wife. Before moving her things she went to the house of her husband's mother to see him. She did not find him. She swears that she was willing to live with him then, and always has been willing.

With an answer in full denial of the bill and the burden of proof unquestionably upon the plaintiff, we cannot say that the charge of wilful and obstinate desertion is made out. On the contrary, the husband himself admits that he removed his wife to her mother's while she was unwell; that he left her for weeks without communicating with her; that upon his return he did not go to see her at once, and that he has since had no communication with her. Threats and abuse by her brother for his conduct towards his sister are the excuse he gives for having nothing more to do with his wife. It is unnecessary to give in this connection any general definition of the terms wilful and obstinate as qualifying the desertion, which, by the statute, is a ground of divorce. The husband here carries his wife to her mother's house while she is indisposed, leaves her there to be provided for by her family, under a promise that he will take her back upon her recovery, goes away to a neighboring town for weeks, has no communication with her, returns but does not go at once to inquire of her welfare, permits his wife, after such treatment, to remove her "things" from the house, makes no explanation of his conduct, seeks no opportunity to do so, and gives as his excuse for his sub-

sequent continued abandonment the fear of her brother. This is no wilful and obstinate desertion of him by her. No intent in the mind of the wife to desert is established.

The other ground upon which a divorce is sought is the habitual indulgence of a violent and ungovernable temper.

We do not propose to insert the testimony upon this subject in this opinion. There is no evidence of a violent temper. It appears from the proof that the husband, upon returning from his daily labor, would request his meals, and that she would frequently in an angry tone of voice tell him to do it himself; that she did not keep his clothes in as good order as she should have done, and that she frequently washed and boiled the potatoes in the same water. The failure to perform marital duties of this character is not to be commended, but it is not every exhibition of temper or ill humor that justifies a divorce. There is here nothing violent in connection with the acts proved.

We deem it necessary to examine the last ground upon which the reversal of the decree is sought in this case, as in the view we take of the case the decree must be reversed and the bill dismissed.

Decree reversed and bill dismissed.

MELISSA KING, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. Chapter 2092 of the Laws of Florida, approved February 7, 1877, providing that "every misdemeanor of which the Circuit Court shall have jurisdiction may be tried upon presentment or indictment by a grand jury, or upon information filed by the State Attorney, or the duly authorized prosecuting attorney of the Circuit

Court," is not in conflict with section 8 and 9 of the Declaration of Rights.

2. Infamous crimes are defined to be such crimes as subject a man to infamous punishment, such as disqualifies him from being a witness.

3. It is not necessary that an information in a criminal proceeding contemplated by this law should be presented by a grand jury. If presented by the "State Attorney or the duly authorized prosecuting attorney of the Circuit Court," entered in the minutes of the court and filed, it is sufficient.

4. Where the information charged that the house was kept "for the purposes of prostitution and lewdness," held, that it was not double or multifarious, and if sufficient of the allegations are proven to constitute an offence, there may be a conviction.

5. Upon the trial on an information for keeping a "house of ill fame, resorted to for the purposes of prostitution and lewdness," evidence of the reputation of the house and those who vist it may be given.

6. In order to warrant a conviction, there must be proof that the defendant was the keeper of the house.

Writ of error to the Circuit Court for Escambia county.

The facts of the case are stated in the opinion of the court.

C. C. Yonge for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

One ground of error is that the offence with which defendant is charged is not triable on an information filed, but only on an indictment found by a grand jury. Chapter 2042, of the Laws of the State, approved February 7, 1877, provides that every misdemeanor of which the Circuit Court shall have jurisdiction may be tried upon presentment or indictment by a grand jury, or upon information filed by the State attorney, or the duly authorized prose-

cuting attorney of the Circuit Court. The counsel for defendant insists that this statute is in conflict with the Declaration of Rights, and cites the 8th and 19th sections of such Declaration of Rights.

Section 8 provides that "no person shall be tried for a capital or otherwise infamous crime except in cases of impeachment, and in cases of the militia when in active service in time of war, or which the State may keep with the consent of Congress in time of peace, and in cases of petit larceny under the regulation of the Legislature, unless on presentment and indictment by a grand jury," &c.

Section 19 is as follows: "The rights of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrants issued but in probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons and thing or things to be seized."

It will be seen that section 8 above cited applies to persons tried for a "capital or otherwise infamous crime," exempting by its very words certain other offences from the necessity of a presentment by a grand jury. What then constitutes the *"infamous crimes"* which makes it necessary to have the action of the grand jury upon before the party accused can be tried? In Hickman's case, (R. & M., 34,) cited in Tomlinson's Law Dictionary, it was held by the judges that where the statute inflicted punishment for falsely accusing another of an infamous crime, such crimes only were to be deemed infamous as subjected a man to infamous punishment, or incapacitated him from being a witness.

Blackstone says "infamous persons are such as may be challenged as jurors *propter delictum,* and therefore never shall be admitted to give evidence to inform that jury with whom they were too scandalous to associate."

Mr. Bishop, in his work on Criminal Law, in commenting upon this subject, says: "Probably the test is to inquire whether the crime shows such depravity in the perpetrator, or such a dispositoin to pervert public justice in the courts as creates a violent presumption against his truthfulness under oath," and then remarks that the difficulty is in the application of the test. In this case it is not difficult, as the Legislature has fully determined it.

Section 13, Chapter 8 of Chapter 1637, provides that "whoever keeps a house of ill-fame, resorted to for the purpose of prostitution or lewdness, shall be punished by imprisonment in the county jail not exceeding one year," thus constituting the crime under our statutes a misdemeanor, which does not disqualify a person from becoming a witness. The law (Thomp. Dig., 335,) does name the crimes the conviction for which shall exclude the person from being a witness or giving evidence, thus establishing the meaning of the term "Infamous Crimes," as used in section 8 of the Declaration of Rights. The offences thus named are "the crimes of murder, perjury, piracy, forgery, larceny, robbery, arson, sodomy or buggery." Section 19 can have no reference to proceedings like these. It applies purely to the seizure and search of buildings and dwellings, and the arrest of persons at such times.

The statute authorizing misdemeanors to be tried upon information filed is not, in our opinion, in conflict with any of the provisions of the Declaration of Rights.

The State Attorney having the right to proceed by information, the question arises under the assignment of errors whether such information was good in form and properly brought? We have no statute prescribing the forms of proceeding upon information, but they are entirely governed by the common law. It is in its structure similar to an indictment, omitting the formal commencement and conclusion, and is not presented to the court upon the oath of

the grand jury, but the facts are suggested to the court by the authorized officer on the part of the State, and may be filed without application to or leave of the court.

Sir Wm. Blackstone, in commenting upon the nature and offices of an information, says: "There can be no doubt but that this mode of prosecution by information (or suggestion) filed on record by the King's Attorney-General, or by his coroner, or master of the Crown office, in the Court of King's Bench, is as ancient as the common law itself. For as the King was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit, so when his immediate officers were otherwise sufficiently assured that a man had commited a gross misdemeanor, either personally against the King or his government, or against the public peace and good order, they were at liberty, without waiting for any further intelligence, to convey that information to the Court of King's Bench by a suggestion on record and to carry on the prosecution in his Majesty's name." Statutes of some of the States of this Union require the information to be founded upon an affidavit of the prosecutor, but we do not find that such affidavit was necessary under the common law, the Attorney-General or Master of the Crown office acting in their official capacities. In the case at bar, the record shows that the information, which was for keeping "a house of ill-fame, resorted to for prostitution and lewdness," was in proper form, made by the State's Attorney and presented to the court by the grand jury, and that it was noted down upon the minutes of the court and properly filed. It was not necessary that it should have been presented by the grand jury, as the suggestion in proper form, made by the officer designated by the law, noted on the minutes of the court, was sufficient, but we cannot see that the fact of its being presented to the court by the

hands of the jury would render it invalid. The defendant cannot claim that the information was "informal, double and insufficient." As presented by the record in this case it reads as follows:

"THE STATE OF FLORIDA.

"In the name and by the authority of the State of Florida:

"In the Circuit Court of the First Judicial Circuit of the State of Florida for Escambia county, at the Fall Term thereof, in the year of our Lord one thousand eight hundred and seventy-seven.

"Escambia County, to-wit:

"Be it remembered that William H. Milton, State Attorney for the First Judicial Circuit of the State of Florida, prosecuting for said State, being present in said court on the 27th day of September, 1877, gave the court to be informed and understand that one Melissa King, late of the county of Escambia aforesaid, in the Circuit and State aforesaid, on the first day of September, in the year of our Lord one thousand eight hundred and seventy-six, then and there being in the county of Escambia, then and there at said time and on divers other days and times between that day and the filing of this information, then and there being, then and there unlawfully did keep a house of ill fame resorted to for prostitution and lewdness, and the said Melissa King certain persons as well men as women of evil name and fame and of dishonest conversation, then and on the said other days and times there unlawfully and willingly did cause and procure to frequent and come together, and the said men and women in the said house of her, the said Melissa King, at unlawful times, as well in the night as in the day, then and on the said other days and times there to be and remain drinking, tippling and whoring and misbehaving themselves, unlawfully did permit and yet do permit, against the form of the statute in such cases made and pro-

vided, to the evil example of all others in the like case offending and against the peace and dignity of the State of Florida, wherefore the said William H. Milton, the State Attorney as aforesaid, prosecuting for said State as aforesaid, prays the advice of the said court in the premises, and that the said Melissa King may be arrested and held for trial under the foregoing information, and that a capias may issue forthwith for her arrest.

W. H. MILTON,

State Attorney for the First Judicial Circuit of the State of Florida prosecuting for said State."

The statute provides the penalty for keeping a "house of ill fame restorted to for the purpose of prostitution *or* lewdness," while the information charges the defendant with keeping the house "for the purposes of prostitution *and* lewdness."

The keeping the house for either of the offenses charged, for the purpose of prostitution or for the purpose of lewdness, would be a misdemeanor under the statute, and the charge in the information constitutes at least one offence, the proof of which would render her liable to the penalty. We cannot hold that the information was either informal, double or insufficient.

"Where the indictment charges in a single count that the house was kept as a bawdy house, and as a disorderly house, and as a tippling house, and as a dancing house, it is not therefore multifarious, and if sufficient of the allegation is proved to constitute an offence, there may be a conviction." Bishop on Crim. P. §106; Commonwealth vs. Kimball, 7 Gray, 328; State vs. Hanchett, 36 Conn., 35; State vs. Fletcher, 18 Mo., 425.

Another ground of error assigned is "that the court erred in admitting evidence of the reputation of the house in which the defendant resided and those who visited it, though objected to by the defendant."

On the trial one Frank Touart testified that "he knew defendant; she lived on Saragosa street, in Pensacola, Escambia county, Florida; do not know that she keeps a house of ill fame resorted to for the purposes of prostitution and lewdness."

"Q. Do you know the general reputation of the house?"

This question was objected to and the objection overruled. To which the defendant excepted.

"I do know the general reputation of the house; it was a loose house; he knew the reputation of the house for prostitution and lewdness; it was bad; it was resorted to by men and women in 1876 at all hours of the night; character of women there for virtue bad; do not know that it was resorted to for purpose of prostitution and lewdness."

"Q. Do you know the reputation of the women who resorted there?' "

"Question objected to and objection overruled, and exception taken by defendant. Witness answered, 'I do not know the reputation.' "

Other evidence of the same character was given under like objections, rulings and exceptions. Not only the reputation of the house so informed against, but also the reputation of those who visit it, may be inquired into. It would be difficult to prove particular instances of the offence which gives character to such a house, in order to convict its keeper. It is this very character acquired by it as the resort of prostitutes and lewd persons that makes it criminal in the eye of the law. Having established a reputation among the citizens of the district, that reputation may be proved in the same way as may the general character of an individual witness. 2 Bishop C. P. §112, &c.; State vs. McGraw, 41 N. H., 406; Commonwealth vs. Gannett, 1 Allen, 7; Ib. vs. Kimball, 7 Gray, 328; State vs. McDowell, Dudley, S. C., 346; Cadwell vs. State, 17 Conn., 467; State vs. Hand, 7 Iowa, 411.

We are aware that the courts of some of the States have held that evidence of reputation of the house as a house of ill fame is not admissible, but believe the better rule to be that adopted in Connecticut. In that State the language of the statute is precisely similar to our own, "keeping a house of ill fame resorted to for the purposes of prostitution or lewdness," and the courts of that State have held that by force of these particular words, it is both permissible and necessary to prove the reputation of the house.

The case cited by defendant's counsel from 39 Iowa, 379, 339, State vs. Lyon, is not applicable to this case. There the indictment was found upon a statute against a lessor for leasing a building "for the purpose of prostitution and lewdness," and the "ill fame" of the house was not in question, therefore the evidence was not admissible.

After verdict the defendant moved for a new trial upon the ground, among others, that the verdict was "unsupported by the evidence," &c. There is no evidence in the record before us showing that the defendant kept the house the reputation of which was proven.

Frank Touart testified that he "knew defendant; she lived on Saragosa street, Pensacola, Escambia county, Fla.; it was resorted to by men and women in 1876 at all hours of the night," &c.

This, with some other proofs of the same character, but no more definite, is the only evidence before us in any way tending to show that defendant was connected with the keeping of any house, and it is surely insufficient to warrant a conviction upon the information.

A new trial should have been granted for this reason and therefore the judgment is reversed and remanded for further proceeding in pursuance of law.

Judgment reversed. New trial ordered.

RICHARD EVANS, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

On the trial upon an information for a misdemeanor, it is not only necessary to state in such information the county or place in which the offence was committed, but the proof must sustain that allegation.

Writ of Error to the Circuit Court for Escambia county.

The facts of the case are stated in the opinion of the court.

C. C. Yonge for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an information in similar form for the same offence, "keeping a house of ill-fame for the purposes of prostitution and lewdness," and presented in like manner to the Circuit Court of Escambia county, as the one passed upon at this term of this court in the case of Melissa King vs. The State. The assignments of error are the same, the same questions are raised in both, and they were argued together. The settlement of the questions involved in the other case determines this.

The only difference arises in the strength and character of the evidence taken upon the trial.

In this case, as in the other, a motion for a new trial was denied by the court, one of the grounds of such motion being "that the verdict was not supported by the evidence," and the counsel for the defendant insists that there is no proof of the place where the offence was committed.

The only evidence found in the bill of exceptions as to the venue is in the testimony of Charles Grinton. He says "the defendant has lived within two years previous to the last term of this court at the wharf known as Commendencia Street Wharf." The information charges that the offence was committed in Escambia county, but there is no evidence to show that fact. There is an entire want of proof to sustain the allegation in this respect. It is not only necessary to state the county or place in which the offence was committed to give jurisdiction, but the proof must sustain the allegation. Green vs. State, 41 Ala., 419; Spaight vs. State, 29 Ib., 32; Seavy vs. State, 4 Tex., 450; Snyder vs. State, 5 Ind., 194; Gordon vs. State, 4 Mo., 375.

Judgment reversed and new trial awarded.

MOLLIE MCCOY, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

On the trial for a misdemeanor, the prosecutor must show that the offence was committed within the time limited by the statute for the prosecution of such offences.

Writ of error to the Circuit Court for Escambia county.

The facts of the case are stated in the opinion of the court.

C. C. Yonge for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE VAN VALKENBURGH delivered the opinion of the court.

This was an information identical in the questions raised upon the trial with the case of Richard Evans vs. The State, decided at this term of the court, and the decision of such questions in that case disposes of this.

There was in this case a motion for a new trial, as in that case, denied by the court, one ground of which was "that the verdict is unsupported by and against the weight of the evidence." The defendant's counsel insists that there was no proof before the jury as to the time when the offence charged was committed, and, second, that the proof was insufficient to connect the defendant with the keeping of the house. The case was tried at the March term, 1878. Frank Touart testified "that he was marshal of the city of Pensacola last year, know the house reputed to be kept by Mollie McCoy; think it was kept by Mollie McCoy, because she took out a city license for a boarding house during my term of office; know that during my tims as City Marshal men were in the habit of visiting the house until very late hours of the night."

This evidence fixes the time spoken of by this witness as during his term of office as City Marshal, which he says was "last year."

Alexander Gonzales says, "I know the house kept by Mollie McCoy."

Charles LeBaron, Jr., testified that he "knew the house said to be kept by Mollie McCoy; it is at the foot of Palafox Street Wharf, in Pensacola, Escambia county; don't know who keeps it."

William Abercrombie testified that he "knew the house said to be kept by Mollie McCoy."

This is all the evidence before us relating to the time when the offence was committed, or to connect the defend-

ant with the keeping of the house. Touart, in his evidence, does not prove the offence, and he is the only witness in any way referring to time. Gonzales knows the house kept by Mollie McCoy, but the question here occurs, when so kept? Before or since the information was filed, or was it within the statutory time within which such offences may be prosecuted? Le Baron did not know who kept it, and Abercrombie only knew that it was said to be kept by the defendant. This is too loose and unsatisfactory evidence upon which to convict a person of such an offence.

The judgment must be reversed and a new trial awarded.

BILL NELSON, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. The statute of limitations in respect to crimes is to be construed liberally in favor of defendants, and it is not necessary for a party relying upon it to plead it in bar. The offence must be proved to have been committed within the statutory limtation.

2. A conviction for murder in the third degree, although had on an indictment for murder, cannot be sustained where the offence was not prosecuted within the period fixed by the statute, to-wit: "Within two years next after the offence shall have been committed."

Writ of error to the Circuit Court for Alachua county.

The facts of the case are stated in the opinion of the court.

Jesse H. Goss for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

At the Spring Term of the Circuit Court, held in and for Alachua county, in the month of April, A. D. 1877, the plaintiff in error, Bill Nelson, was indicted by the grand jury for the murder of one Samuel H. Jackson. The offence is alleged in the indictment to have been committed in the county of Alachua on the fifth day of November, 1872. The prisoner was arraigned on such indictment and plead "not guilty." On the fourth day of April, 1878, he was tried by a jury, the evidence showing "that the offence was committed on or about the time as alleged in the indictment," they finding the prisoner guilty of murder in the third degree.

The counsel for the prisoner then moved to arrest the judgment and for a discharge of the prisoner, upon the following grounds:

1st. That the facts shown in the case do not make a case of murder in the third degree, but shows either justifiable homicide, or manslaughter in some of the degrees.

2d. That the verdict of the jury shows that the defendant committed an offence not punishable by death, and is entitled to his discharge under the statute of limitations.

On the argument of the motion the court declined to grant the same, and the counsel for the prisoner duly excepted.

The prisoner was then sentenced "to confinement in the State penitentiary for the space of twelve years," and the prisoner thereupon brings his writ of error.

The errors assigned are as follows:

1st. The court erred in refusing to discharge the prisoner, Bill Nelson, upon his motion for a discharge, when the verdict showed that the offence he had committed was not punishable with death, and the indictment showed and

charged the offence to have been committed at a time more than two years before the finding of the indictment.

2d. The court erred in refusing to discharge the prisoner when the indictment charged and the proof showed the offence was committed more than two years before the filing of the bill, and the verdict of the jury showed the offence not to be one punishable with death.

The statute of this State, applicable to crimes and the punishment thereof, reads as follows: "All offences not punishable with death shall be prosecuted within two years next after the same shall have been committed." (Thomp. Dig., 490.)

The jury in this case have, by their verdict, determined it was an "offence not punishable with death;" the indictment charges that it was committed more than four years before prosecution, and the evidence, according to the bill of exceptions before us, shows that it was committed on or about the time as alleged in the indictment.

Statutes of limitation in respect to crimes are always construed liberally in favor of defendants, and it is not deemed necessary for a party relying upon them to plead them in bar.

The prosecutor must show the commission of the offence within the time fixed by the statute.

In the case of White vs. The State, (4th Texas, Court of Appeals R.,) the court, in reviewing a case similar to this, says: "It will be seen by the verdict of the jury that defendant was acquitted by the jury of the charge of murder, and we think the crime of manslaughter was barred by the statute of limtations at the time the indictment was found."

The same rule has been applied by the courts of other States. The State vs. Foster, 7 Lou. An., 256; The State vs. Freeman, 17 Lou. An., 69; Heward vs. State of Mississippi, 13 Smedes & M., 231; Commonwealth vs. Ruffner, 28 Pa. State R., 259.

The judgment of the court must be reversed and the prisoner discharged.

LOTT MCNEALY AND DANIEL ROULHAC, PLAINTIFFS IN ERROR, VS. THE STATE, DEFENDANT IN ERROR.

1. An application for a change of venue is addressed to the sound discretion of the court, and unless it appears that the court acted unfairly and abused its discretion, there is no error.

2. The great respectability and influence of prosecuting witnesses in a criminal case, no undue influence having been exerted by them to create a prejudice against the accused, is not good ground for a change of venue.

3. Nor is it good ground for changing the venue to another county that the people of a county are prejudiced against persons charged with certain crimes, there being no allegation of any special prejudice against the accused.

4. An application for a continuance is addressed to the sound discretion of the court, and the action of the court will not be reviewed unless palpable unfairness is shown.

5. A continuance should not generally be granted in a criminal case merely on account of the absence of a witness as to the good character of the accused.

6. Where proceedings of the court alleged to be erroneous do not affirmatively appear of record, but only by way of recital in a motion of counsel which was denied, this court will not assume that such proceedings were actually had, and will not review a fact so recited. Counsel objected to the trial of a prisoner upon a certain count of an indictment on the ground that at a previous trial the count had been withdrawn; and a motion for a new trial was made upon the same ground and denied, but the record did not show that there had been a previous trial or waiver of the court, and upon error it is held that the question is not presented by the record.

7. A. furnishes land, mules and a certain quantity of provisions, B. furnishes labor and all other supplies necessary to raise a crop, and

they agree that one shall have two-thirds and the other one-third of what is made: *Held*, That they are tenants in common of the crop produced, and an indictment for larceny of the product properly charged that it was the property of both A. and B.

Writ of Error to the Circuit Court for Jackson county.

The facts of the case are stated in the opinion of the court.

D. L. McKinnon and B. F. Lidden for Plaintiff in Error.

The Attorney-General for Defendant in Error.

THE CHIEF JUSTICE delivered the opinion of the court.

The plaintiffs in error were indicted in Jackson county for breaking and entering a gin-house and stealing a quantity of cotton. The indictment contained two counts. They moved the court for a change of venue to some other county upon grounds stated in their affidavit, as follows:

"That they do not believe they can get a fair and impartial trial in the county of Jackson, on account of the undue influence of the principal witnesses, who are prominent merchants in the county, over the minds of the inhabitants of Jackson county, and the great prejudice existing among the people of Jackson county against all persons charged with cotton stealing and breaking into gin-houses with intent to commit felony."

The State Attorney objected to the granting of the continuance and disputed the statements in the affidavit, and the Judge, after examining the Sheriff and Clerk, refused to grant the motion, to which exception was duly taken.

This ruling of the Judge is alleged to be erroneous.

The accused then moved the court to continue the cause to the next regular term of the court, on grounds stated in the affidavit of McNealy, that he cannot safely go to trial

at this term of the court on account of the absence of Sarah A. Hays, a material witness for said defendant; that said witness has been duly served with a subpœna; that she is absent without the consent of the said defendant; that she resides in Jackson county, and he expects to procure her attendance at the next term; that he expects to prove by her that he bore a good reputation for honesty in the community where he lived; that he lived near the witness for about eleven years, and she is well acquainted with his general reputation for honesty.

The State Attorney objected to the continuance, and stated that he was willing to admit that Sarah A. Hays, if present, would testify to the facts which defendant stated she would testify to.

The Judge refused to grant a continuance, to which ruling an exception was taken. This ruling is assigned as error.

The record, after reciting the indictment, proceeds thus: "Upon said defendants being brought forward to be arraigned upon the foregoing indictment, before said indictment was read to them upon said arraignment the defendants by their attorneys objected to the whole of said indictment being read to the defendants, or to their being arraigned upon the whole indictment, upon the following grounds, to-wit: that on a former trial of the said defendants, upon the same indictment, the defendants, after the testimony was closed on both sides, moved that the State Attorney be put to his election upon which count of the indictment he would go to the jury, and said motion being resisted by the State Attorney, the Judge nevertheless granted the same and the State Attorney selected the first count, and defendants now say the State is still bound by said election." But the Judge decided that the objection ought not to be allowed, but that the defendants ought to be arraigned upon both counts, and thereupon the defendants

were arraigned and tried upon the whole indictment. To this ruling the accused excepted, and assign error thereon.

The defendants were then (as the record states) arraigned upon the whole indictment and pleaded not guilty and the trial proceeded.

Upon the State Attorney in opening the case to the jury proceeding to read the indictment, the accused objected to his reading the second count upon the ground "that the State Attorney, in a former trial upon the same indictment of the defendants, had elected to rely upon the first count of the indictment, and that he should now be bound by said election." But the Judge decided against the objection and allowed the whole indictment to be read to the jury. The accused excepted and this ruling is assigned as error.

After the hearing of testimony in behalf of both parties the cause was submitted to the jury, who rendered a verdict of guilty as to both of the accused.

A motion was made for a new trial on the ground that the verdict was against the evidence; that the evidence was insufficient; that the court erred in permitting the second count of the indictment to be read to the jury, the State Attorney having elected to proceed upon the first count, and that the charge of the court (which is not in the record,) was contrary to law. The court refused a new trial and sentenced the accused to imprisonment in the State Prison for one year.

I. The first question suggested by the assignment of errors is that the court overruled the motion for a change of venue.

The statute (laws of 1868, sec. 13, p. 108,) says that "all criminal causes shall be tried in the county where the offence was committed, except when otherwise provided by law, unless it shall appear to the satisfaction of the court, by affidavit, that a fair and impartial trial cannot be had

in such county." This is substantially the law of 1845. If it shall appear to the satisfaction of the court that a fair and impartial trial cannot he had in the county, (the law says,) the court may direct that the accused be tried in some other county adjacent to it, where a fair and impartial trial may be had.

It is very uniformly held by the courts that an application for a change of venue is addressed to the sound discretion of the court, and the ruling of the court in refusing the change will not be held erroneous unless it appears upon the facts presented the court acted unfairly and was guilty of a palpable abuse of sound discretion. The statute places the matter in the judgment of the court. The court must be "satisfied" that the accused cannot have a fair and impartial trial in the county.

The application for the change of the venue in this case merely stated the belief of the defendants that they could not have a fair and impartial trial because the prosecuting witnesses were men of influence in the community, and because of the great prejudice of people against persons charged with breaking into gin-houses and stealing cotton. The high standing and respectability of the witnesses is certainly not a good reason for a change of venue. It is not stated that they have been guilty of actively exercising their influence and position to create a prejudice against these defendants in Jackson county, nor is it stated in the affidavit that there is any prejudice in the county against them arising from any source. And it is not probable that there is any county in the State in which the mass of reputable people are not "prejudiced" against burglary and larceny.

We cannot find in the proceedings of this case any reason for imputing unfairness or partiality on the part of the Judge in refusing the transfer of the place of trial.

II. As to the application for a continuance, the rule of

law is the same; the application is addressed to the sound discretion of the court, and except it appears that there has been a gross abuse of discretion whereby the rights of the accused may have been jeoparded, the decision of the court will not be disturbed. 5 Gilman, 473; 1 Blackf., 63; 9 Iredell, 429; 13 Miss., 382; 3 Gilman, 368; 2 ib. 540; 12 Grattt., 564; Gladden vs. State, 12 Fla., 562; 9 Fla., 490; 13 Fla., 675; 3 Parker Cr. Rep., 199.

There was but one witness on the part of the defendants absent, and the testimony expected from that one was as to the good character of the accused. An examination of the record shows that no testimony as to the good character was offered on the trial. May we not conclude, therefore, that the accused knew of but one person who would testify to his good character, notwithstanding he had lived in the same neighborhood over eleven years? The courts in England and the older States very uniformly refuse to continue cases on account of the absence of witnesses as to character only. (3 Parker, 199, and authorities cited.)

III. As to the point that upon a previous trial the State Attorney had elected to try the accused upon the first count and abandoned the second, and upon a second trial they were tried upon both counts, we do not find in the record any ground for the question. The record does not show that there had been a previous trial, or that one of the counts of the indictment had been abandoned. Such fact is recited in several motions of counsel spread out in the record, but the motions were denied in each instance, and for aught that appears they were denied because the fact did not exist. A recital by counsel in a motion gives us no evidence that the fact so recited had any existence. As this record gives no intimation other than by the recital of counsel that there had been a previous trial, and the foundation being therefor not laid for raising the question, of course we cannot decide it.

IV. The remaining ground assigned as error in the ruling of the court is that the court denied the motion for a new trial made on the alleged ground that there was not sufficient evidence to warrant the verdict. The point made in the brief and argument of counsel is that the indictment charged that the cotton alleged to have been stolen was the property of B. B. Barkley and Andrew Blanks, whereas the evidence showed that the cotton was the property of Barkley alone.

The testimony touching this matter is as follows: Barkley swears that "Andrew Blanks and I farmed together during the year 1877." (The cotton was of the crop of 1877.) "The gin-house [from which the cotton was taken,] belonged to me individually; the cotton belonged to me and Andrew Blanks; I and Blanks owned the cotton, because I had employed him to work on my land under a contract by which he was to have the land cultivated. I furnished the land and mule, and was to furnish a barrel of pork to every twenty acres of land he cultivated, and was to give him a third of what he could make. The cotton had not been divided. Our contract was a verbal contract. I was to have two-thirds and Blanks one-third."

The argument of counsel is that upon this testimony Blanks was a mere servant or laborer for hire upon the land of Barkley, and that therefore the cotton was the sole property of Barkley. If this conclusion is correct, the proof of the ownership varies from the charge in the indictment as to the ownership, and this variance would be fatal, according to the rules universally observed by the courts which require all material allegations to be proved as charged.

Taking all this testimony together, however, notwithing Barkley says "I employed him to work on my land," yet he gives details of the contract which amounts to much more than mere employment to labor. Barkley, by

this agreement, was to furnish the land and a mule and barrel of pork for every twenty acres he should cultivate. The counterpart of this contract is that all the mules or teams and pork, and all other supplies, implements, seed, labor, &c., required beyond those named, were to be furnished by Blanks, and Barkley was to have two-thirds and Blanks one-third of the crop. The quantity of land to be cultivated was not named, this being left to the judgment of Blanks or of both parties. 'Blanks and I farmed together," one furnishing the land and a certain portion of the working stock and supplies, and the other the balance of supplies, the labor, team, implements, seed, &c. The relation these parties under this contract more nearly resembles a partnership than that of employer and servant.

By this contract each party was bound to furnish a certain portion of material for making a crop of cotton upon the land of one of them, and they agreed on the proportions of the crop to belong to each at the end of the enterprise. Here is no letting of land for a specified rent, nor a hiring of land as by a tenant. It is a cultivation of land upon shares under a special agreement, and the result is a tenancy in common of the crop. (8 John., 151; 3 ib., 216; 15 Wend., 379; 8 Cowen, 220; 34 N. H., 454; 15 Barb., 595; 39 Ill., 372.)

It follows that the allegation in the indictment that the cotton was the property of Barkley and Blanks was sustained by the proofs.

The whole testimony was fairly submitted to the jury, and though there was some conflict in the statements of witnesses, we cannot say that the verdict was an improper one.

The judgment is affirmed.

THORNTON B. COLEMAN, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. It is no error to permit the jury to take with them to their consultation room the charge of the court, nor is it error to recall the jury, withdraw from their consideration erroneous instructions, and in lieu thereof to give additional ones.

2. The original charge having been properly signed and sealed, the court recalled the jury, struck out certain of his instructions which had been excepted to, and gave others in writing, in place thereof; *Held*, that those given in place of those stricken out must be considered as only amendments to the original charge, and that they became a part of such original charge.

3. Three of the jurors at a restaurant, where the bailiff had conducted them for the purpose of getting refreshments, passed into an adjoining cook-room, leaving the body of the jury in the eating room, but being within view of the bailiff: *Held*, not to be such a separation as would invalidate the verdict.

Writ of error to the Circuit Court for Hillsborough county.

The facts of the case are stated in the opinion of the court.

Wall & Willis for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

The plaintiff in error was indicted, tried and convicted of murder at the Circuit Court of the Sixth Circuit held in Hillsborough county, at the Fall Term, 1878. Among other things, the court charged the jury as follows: "It is true that when the killing of a human being by another is proved, the law raises the presumption of malice, and the

killing being established, it is incumbent upon the defendant to rebut such presumption, unless the same is rebutted by the evidence on the part of the State." Again the court charged, "malice is implied by law, by any deliberate, cruel act committed by one person against another, no difference how sudden. Thus when a man kills another suddenly without any, or without a considerable provocation, the law implies malice."

The counsel for the prisoner asked the court to instruct the jury,

First. That the proof of the mere fact of the killing is not sufficient for them to presume malice, but that all presumptions are in favor of the innocence of the accused, and that the animus with which the killing was committed must be inferred from the conduct of the accused, and other circumstances of the case.

Second. That in arriving at the conclusion as to the animus of the accused, they may take into consideration threats made by the deceased against the life of the accused a short time before the kiling, although it be proven that those threats had been communicated to the accused.

The court refused to charge the jury as contained in the first request of the defendant's counsel, but did instruct the jury as requested by the defendant in the second request so made by him. After such charge the jury retired to consider of their verdict, taking with them, by consent of the State's attorney and the prisoner's counsel, the charge of the court. Soon thereafter the court recalled the jury, and in their presence struck out a portion of the charge which defendant's counsel had excepted to, to-wit: the following words:

"It is true that when the killing of a human being by another is proven, the law raises the presumption of malice, and the killing being established, it is incumbent upon the defendant to rebut such presumption, unless the same

is rebutted by the evidence on the part of the State." In lieu of the part of the charge so stricken, the court gave the following instruction, to-wit: "The within instructions asked by the defendant given." (Those being the instructions requested by the defendant and hereinbefore set out.) "The first instruction with this qualification: The jury being the judges of all the facts and circumstances in the case, they are to say whether or not the alleged killing was done maliciously under the charge of the court as to how malice expressed or implied by law is proven."

When the jury was recalled, and after the portion of the charge excepted to had been thus stricken out, and after the instructions asked for by the defendant's counsel had thus been given, the said counsel were inquired of if they had any objections to make to these alterations and replied that they had not, and no exception was taken.

After verdict, defendant's counsel moved that the judgment be arrested, that the verdict be set aside and a new trial granted, for reasons as follows:

1st. That the court erred in instructing the jury that when the killing of a human being by another is proven the law raises the presumption of malice, and the killing being established, it is incumbent upon the defendant to rebut such presumption, unless the same is rebutted by the evidence on the part of the State.

2. The court erred in instructing the jury that malice is implied by law by any deliberate cruel act, committed by one person against another, no difference how sudden. Thus when a man kills another suddenly, without any or without a considerable provocation, the law implies malice.

3d. The court erred in instructing the jury that when it is proven that one person threatens the life of another person, such other person should not seek the one making such threats and kill him.

4th. The court erred in refusing to give the first instruc-

tion asked for by defendant's counsel before the charge of the court was submitted to the jury.

5th. The court erred in afterward giving said instruction with a qualification.

6th. The court erred in submitting the charge to the jury without explaining to them that a portion of it was intended to be stricken out.

7th. The verdict is contrary to law.

8th. The verdict is contrary to the evidence.

9th. The jury failed to give the benefit of every reasonable doubt.

10th. The jury discussed the evidence in the case before the same was closed on the part of the defendant and the case submitted to them for their consideration.

11th. The jurors were allowed by the bailiff to visit a public eating-house, kept by one Walter S. Cathcart, and while there they were allowed to separate.

12th. The jurors were allowed to visit a public eating-house kept by one Robert Canning, and there to mingle with persons not on the jury.

Upon hearing the motion upon the last two points made by the defendant's counsel, the judge certifies in the record that "the State attorney read affidavits of the jurors in this case. The petit jurors in this cause were called and sworn upon their *voire dire* and questioned by the court," and the following order was made:

"After a searching investigation as to the conduct of the jury in this case, the court is satisfied that the jury, in arriving at the conclusion they have, were not in the least influenced by outside pressure in any manner whatever, and after considering the other grounds for a new trial, the motion is overruled."

The case is here on writ of error, and the first error alleged is that "the court erred in charging the jury 'it is true that when the killing of a human being by another is

proven the law raises the presumption of malice, and the killing being established, it is incumbent upon the defendant to rebut such presumption, unless the same is rebutted by the evidence on the part of the State.'" The record shows that this portion of the charge, which had been excepted to by the defendant's counsel, was subsequently withdrawn and stricken out by the court before the jury had rendered their verdict, and that in place of it was substituted other instructions, principally suggested by the counsel for defendant. To this striking out and substitution there was no exception taken. The cause of the first exception having been thus withdrawn in time, the exception falls with it and is not now available.

The second error alleged is in "refusing the first instruction asked for by the prisoner's counsel, as follows: 'The proof of the mere fact of the killing is not sufficient to raise the presumption of malice, but that all presumptions are in favor of the innocence of the accused, and that the animus with which the killing was committed must be inferred from the conduct of the accused and other circumstances of the case.'"

This charge was given by the court, as asked by defendant's counsel, before the jury had agreed upon their verdict. It having been so given, the exception taken in the first instance to the court's refusal then to so instruct fails to be of further use. It is true that in addition to the language used by defendant's counsel in his request the court added these words: "The jury being the judges of all the facts and circumstances in the case, they are to say whether or not the alleged killing was done maliciously under the charge of the court as to how malice expressed or implied by law is proven." We cannot see that there is any impropriety in this instruction. This court has held in Nickels & Gautier vs. Mooring, (16 Fla., 76,) that it is not necessary for the court to use the exact language of the coun-

sel in their request to charge the jury, neither is it necessary to be confined to the very instruction asked. The legal propositions should be presented clearly and to the point. But beyond this no exception was taken to this addition to the instructions so requested to be given at the time, and it is too late, even if an exception would have been available, to take it after trial and verdict. (Coker & Schaffer vs. Hayes, 16 Fla., 468; Story & Sullivan vs. State, Ibid., 564.)

The third ground of error is that the "court erred in permitting the jury to take the original charge to their room with them, and then after they had deliberated thereof to recall them, and to strike from his charge that which had been excepted to by defendant," as in his first assignment of error, and giving to them the instruction asked for by defendant, as in his second assignment of error, together with the addition thereto, before referred to.

It is no error to permit the jury to take with them to their consultation room the charge of the court. In Dixon vs. The State, 13 Fla., 636, this court said: "The charge of the court is by law a part of the record. It is required that the Judge deliver it to the jury as it is written. If it is desired by the jury, it is difficult to perceive any good reason why they may not take to their room the writing itself. Indeed, they may thus better understand it and avoid confusion in their deliberations." There can be no greater reason assigned for prohibiting them from taking an amended charge, if properly amended, than from prohibiting them from taking the original charge.

The fourth assignment of error is, "that the court erred after he had charged the jury and they had retired to deliberate of their verdict, to recall them on his own motion, and then strike out a part of his charge before given, and further upon his own motion to give them an additional charge." Bishop, in his Criminal Procedure, Sec-

tion 1,000, says the retiring of a jury to deliberate on their verdict does not necessarily cut off all communication between them and the judge. If, however, the judge has occasion to make a communication to them, he should send his officer for them, and the communication should take place in open court. (3 Am. C. Law, §3,139; Sargent vs. Roberts, 1 Pick., 341; Jones vs. Van Patten, 3 Ind., 107; Hall vs. The State, 8 Ind., 439.)

The judge having then the undoubted right to communicate with the jury in open court, was there error in withdrawing a portion of his written charge and substituting in lieu thereof other instructions? We cannot see that there was. The jury had not agreed upon their verdict, they were then consulting upon the case presented to them, the charge of the court was before them, and the court having upon consideration concluded that a portion of that charge was erroneous, recalled them, and corrected so much of it as he deemed necessary. It frequently occurs that juries come into court and ask for further instructions upon some particular point which arises in their investigations. The defendant sustained no injury, for those portions of the charge stricken out had been excepted to by his counsel, and those instructions given had been principally suggested, by him. In the case of Hall vs. The State, 8 Ind., 439, above referred to, the court in their opinion say: "The right of the court to communicate with the jury during their deliberations upon a cause, to withdraw from their consideration erroneous instructions, and to give additional ones, &c., is undoubted." But all this was done, as appears by the bill of exceptions, with the consent of the defendant's counsel and no objection made or exception taken.

The fifth assignment of error is that "the court erred in not sealing his last charge to the jury."

The statute, Chapter 2096, approved March 2nd, 1877, provides that in such cases the charge shall be signed and

sealed by the judge, be filed and form a part of the record in the case. The original charge was so signed and sealed; the subsequent amendment of such charge was signed but did not have the seal attached to it. We consider it as simply an amendment by striking out one portion and inserting in lieu thereof other instructions. It is a substantial compliance with the statute, and no objection was made or exception taken to it in the court below. The amendment became a part of the original charge, which was signed and sealed by the judge.

The sixth assignment is that the court erred in instructing the jury, "that malice is implied by law by any deliberate, cruel act, committed by one person against another, no difference how sudden. Thus, when a man kills another suddenly without any, or without considerable provocation, the law implies malice." Any "deliberate, cruel act" must imply malice. The word itself means a consideration of the act, "well advised or considered," thought of and weighed in the mind. Taken with the other portions of the charge bearing upon this subject of malice, we cannot see that it could by any possibility mislead the jury.

The seventh assignment of error was abandoned by the defendant's counsel on the argument.

The eighth assignment is that the court erred in not granting a new trial.

The evidence was conflicting, the jury were the judges of the credibility of the witnesses, and they have passed upon the case. The only questions, therefore, not considered thus far, are those raised by the 11th and 12th points made by defendant's counsel on this motion for a new trial. The record discloses the facts that on the argument of the motion for a new trial, affidavits were read and considered by the court respecting the allegations made in the 11th and 12th points referred to. Not only that, but without objection from either side, the "petit jurors in this

cause were called and sworn upon their *voire dire,* and questioned by the court." The court being upon such "searching investigation" satisfied that the jurors "were not in the least influenced by outside pressure in any manner whatever," overruled the motion.

Aside from this, the evidence in the record does not establish definitely a separation of the jury. It appears that they visted the saloon of one Cathcart for the purpose of getting refreshments, under the charge of the bailiff; that while there three of the jurors stepped through a door into the cook room, that no person was present in the cook room except the cook and the witness, the bailiff standing at the door in full view of the jurors; that no communication of any kind was held by Cathcart with either of the jurors. The bailiff, Daniel Levingston testified, that the body of the jury, during the time they were so at the restaurant, were kept by him together and did not separate, except that three of them were for a few minutes in the cook room, separated from the body by a screen door, that while they were in the cook room he was at the screen door where he could see the jurors. This is not such a separation of the jury as will render their verdict invalid. (Bishop on Criminal Procedure, §999, and cases cited.)

We can see no reason for reversing the judgment of the court below on this ground.

The judgment is affirmed.

ERNEST W. LADD, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. An indictment for procuring property under false pretenses should contain all the material facts which the prosecutor is bound to prove, among which is the ownership of the property alleged to have been obtained by reason of such false pretenses.
2. It should also contain an averment that the party was induced to part with the ownership of such property by reason of the alleged false pretenses.
3. Chapter 3010, section 3, of the laws of this State, approved February 17, 1877, disqualifies the officers therein named from serving on either a grand or petit jury. It is not a privilege which the officer may avail himself of or not at his convenience.

Writ of Error to the Circuit Court for Duval county.

This was an indictment under sec. 50, chap. 4, of the "Act to provide for the punishment of crimes and proceedings in criminal cases," approved August 6, 1868, and was for procuring certain goods, wares and merchandise by false pretenses. It was found and tried at the Fall Term, 1878, of the Duval Circuit Court, and the defendant was convicted. Motions for a new trial and also in arrest of judgment were made and denied, and the case comes up on a writ of error. The grounds upon which the motions for a new trial and in arrest of judgment were based are contained in fifteen separate points, but as the evidence is not brought up by the bill of exceptions, it is only necessary to notice the point upon which the opinion of the court is founded, viz:

11th. That the said indictment contained no charge or averment of any criminal offence known to the law, or recognized, or described in any law or statute of the State of Florida.

After motions for new trial and in arrest of judgment

were denied, the defendant's counsel further moved "to set aside and vacate the judgment, order, ruling or decision," denying the motion for "new trial and in arrest of judgment," and to be permitted to amend said motion to set aside the verdict and for a new trial on the grounds:

First, "That one E. S. Francis, who was a juror duly empanelled and sworn upon the jury which tried said cause and who served on said jury throughout said trial, and was a member of said jury which rendered said verdict, is now and was, at and before the time of the drawing, empannelled, swearing, trial and rendition of the said verdict in said cause, a regular and duly qualified County Commissioner of the said county of Duval, and that said E. S. Francis is and was at the time of the said trial and verdict disqualified by law as such County Commissioner to serve as a juror."

Second, "That said jury which tried and rendered the verdict in said cause was not a lawful jury, inasmuch as the said E. S. Francis was one of the panel drawn and sworn in said cause, as exhibited by the record of said cause in this court."

Third, "That through the inadvertence of counsel, the fact that E. S. Francis was a member of said trial jury had escaped the memory of counsel for defendant until this day."

To prove the facts set out in the above three grounds for this motion, the defendant produced to the court and offered and used in evidence the certificate of the Clerk of the Circuit Court and Clerk and Auditor of Duval county to the effect that the said Francis was a juror sitting upon the trial of this cause, and that he was on the days of the trial "a County Commissioner of said county, duly commissioned and qualified as such."

This motion was denied by the court and the defendant was sentenced to three years confinement in the State Prison.

Ladd v. State of Florida—Statement of Case.

The indictment upon which the defendant was tried is as follows:

"The State of Florida vs. Ernest W. Ladd, indictment for obtaining goods, wares and merchandise under false pretenses.

"The grand jurors for the State of Florida duly empannelled and sworn diligently to inquire and due presentment make in and for the body of the county of Duval, in said Circuit, upon their oaths do present that Ernest W. Ladd, late of the County of Clay, in said State, on the first day of November, in the year of our Lord 1878, and on divers other days and times between that day and the day of the taking this inquisition, with force and arms within the county of Duval, and State aforesaid, unlawfully, knowingly and designedly did falsely pretend to William S. Wightman as a member of the firm of Wightman & Christopher, partners in trade of the city of Jacksonville, in said Duval county, composed of the said William S. Wightman and John G. Christopher, with intent to defraud the said Wightman & Christopher, that he, the said Ernest W. Ladd, was a member of a certain firm carrying on business at Kingsley's Lake, in the County of Clay aforesaid, by and under the name, firm and style of Ladd & Burnes, and that the last-mentioned firm of Ladd & Burnes was then and there in solvent circumstances, and had then, to-wit: on the first day of November, in the year aforesaid, exchange on New York in the sum of fifteen hundred dollars, meaning thereby that the said firm of Ladd & Burnes had then and there good commercial paper in said sum of fifteen hundred dollars, negotiable and payable in the city of New York and State of New York, and that the said firm of Ladd & Burnes would pay the said firm of Wightman & Christopher one half of the price of the goods, wares and merchandise hereinafter named if the said firm of Wightman & Christopher would sell to him, the said Ernest W.

Ladd, the said goods, wares and merchandise, and would so, as aforesaid, pay the said one-half, that is, would pay as aforesaid about three hundred and forty-four dollars upon the delivery at Kingsley's Lake by said Wightman & Christopher of the said goods, wares and merchandise, by means whereof, that is by means of said false pretenses, the said Ernest W. Ladd did then and there, in the said city of Jacksonville, on the first day of November, 1878, unlawfully, knowingly and designedly, and with the intent to defraud the said Wightman & Christopher, obtain from the said Wightman & Christopher the following goods, wares and merchandise in the several quantities of each different kind, and of the several values set opposite to each particular item in figures, and of the value in all of about six hundred and eighty-five dollars, to-wit:

1 Box tobacco	43	50	$21.50
1 Box defiance	40	60	24.00
1 Box burch	33	80	26.40
1 Caddy blk	21	50	10.50

(Here follows a long list of goods made out in similar form, amounting in the whole to six hundred and eighty-eight dollars and fifty-one cents.)

"Whereas in truth and in fact the said firm of Ladd & Burnes was not then and there in solvent circumstances; *and, whereas,* in truth and in fact the said firm of Ladd & Burnes had not at the time the said Ernest W. Ladd so falsely pretended as aforesaid the exchange on New York aforesaid, as the said Ernest W. Ladd then and there well knew, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Florida."

C. P. Cooper for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE VAN VALKENBURGH delivered the opinion of the court.

This cause comes up on a writ of error from Duval County Circuit Court. The bill of exceptions does not contain the evidence taken upon the trial, and the questions presented to this court for settlement are those arising upon the indictment and as to the disqualification of the juror Francis, and the exceptions to the charge of the court to the jury.

The first assignment of error is "that the court erred in refusing the motion in arrest of judgment and for a new trial made by defendant's counsel, dated December 31st, 1878, the court erring especially in overruling the grounds set forth in said motion numbered 10 and 11, as appears by the records of said cause, the same having been good and sufficient in law to set aside the verdict in said cause."

It is sufficient for the purposes of this case upon that question to examine the alleged error presented as No. 11 above referred to, as it appears in the record:

"That the said indictment contains no charge or averment of any criminal offence known to the law, or recognized, designated or described in any law or statute of the State of Florida."

In order to convict upon an indictment for this offence, it is necessary to allege that the party, by reason of such false pretenses, was induced to part with the ownership of his property. That is the very gist of the offence. The false representations amount to nothing, so far as the prosecutor is concerned, unless he has been induced by them to part with something valuable.

It cannot be assumed that every alleged false statement made by the purchaser can be treated as the criminal offense for which this defendant was indicted. It must be something more; it must have the effect to prevail on the seller to meet the purchaser's wishes and to consent to part

with his property, and it is necessary to allege this fact in the indictment and to prove it on the trial. In this indictment there is nowhere an averment that by reason of such false pretenses he was induced or prevailed upon to sell him the goods upon the terms alleged. It does not follow but that other reasons existed for his disposing of his goods in that way.

In Commonwealth vs. Strain, (10 Met., 521,) the court say in their opinion, "It seems to us that when money or other property is obtained by sale or exchange of property, effected by means of false pretenses, such sale or exchange ought to be set forth in the indictment, and that the false pretenses should be alleged to have been made with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be." Our statute is copied from Massachusetts. In Commonwealth vs. Lannan, 1 Allen, 590, Commonwealth vs. Goddard, 4 Ib., 312, State vs. Philbrick, 31 Me., 401, Schlesinger, 11 Ohio State, 669, State vs. Green, 7 Wis., 676, this rule is strictly observed.

It is nowhere alleged in the indictment that the property which it is charged that the defendant received or procured from the firm of Wightman & Christopher was in fact their property. This allegation is necessary and must be supported by proof. An indictment for obtaining goods by false pretenses must contain all the material facts and circumstances which the public prosecutor would be bound to prove in order to produce a conviction. (People vs. Gates, 13 Wend., 311.) This is certainly one of the material facts. The allegation of the ownership of the property, and proof of that ownership, is necessary to exclude the fact of the defendant's having obtained his own goods or money, in which case there could be no offence unless the prosecuting witness had some special interest in the property.

In a criminal charge Lord Mansfield says there is no lat-

itude of intention to include anything more than is charged; the charge must be explicit enough to support itself. "A considerable degree of particularity in stating the false pretenses is necessary, because they must be proved as laid, and slight variances may be fatal to the prosecution." (Rex vs. Plaistow, 1 Camp., 494.) If they must be proved as laid it follows that none can be proved but such as are laid. In the case of Sill vs. Regina, (English Law and Equity R., Vol. 16, p. 375,) the court held that an indictment for obtaining money, &c., by false pretenses must allege whose property the money was at the time. The same strictness in regard to the indictment for such an offence seems to prevail in this country. Thompson vs. The People, 24 Ill., 60; The State vs. Smith, 8 Blackf'd, 489; The State vs. Vickery, 19 Texas, 326; The State vs. Lathrop, 15 Ver., 279.

The second alleged error is in the court's denying the motion to arrest judgment and vacate the verdict for the reason that Edward S. Francis, one of the jurors that sat in the trial of said cause, was at the time a County Commissioner of Duval County, and therefore not qualified to act as a juror. The fact of his being such County Commissioner is proved by the certificate of the Clerk of the Circuit Court, who is also Clerk and Auditor of the county, such certificate having been used on the motion in arrest of judgment.

The law upon the subject of disqualification of jurors in this State, approved February 17, 1877, chapter 3010, in the latter part of section three, provides that "no Sheriff or his deputies, Assessor of Taxes, Collector of Revenue, County Treasurer, County Clerk, County Judge, County Commissioners, Justices of the Peace or United States officials shall be qualified to serve upon a grand or petit jury." This statute disqualifies a County Commissioner from serving on a grand or petit jury. It is no privilege which the

officer so drawn may avail himself of or not at his convenience, but is equally a disqualification as is that of "persons under prosecution for a crime," which immediately precedes it in the same section.

For these reasons, without an examination of the other errors assigned, we must reverse the judgment and the defendant must be discharged.

Judgment reversed.

DECISIONS

OF THE

Supreme Court of Florida.

JUNE TERM, A. D. 1879

STATE OF FLORIDA, PLAINTIFF IN ERROR, VS. SAMUEL RUSHING, DEFENDANT IN ERROR.

The State is not required to give bond when she prosecutes a writ of error. The statutes authorizing the payment of the costs by the Treasurer upon the warrant of the Comptroller regulate the liability of the State in this respect.

Writ of error to the Circuit Court for Santa Rosa county.

This is an action brought by the State of Florida against the defendant in error, Rushing, a surety on the official bond of Jno. W. Butler, a Collector of Revenue of Santa Rosa county. Final judgment was rendered in the Circuit Court in favor of the defendant in error against the State, to which judgment the State sued out a writ

of error. The defendant in error now moves to dismiss the writ of error on the ground that no bond for costs has been given by the plaintiff in error, as required by law. The general statute regulating writs of error in civil cases provides as follows: "No appeal or writ of error shall hereafter be granted to the original plaintiff in any suit, unless said plaintiff shall first pay all costs which may have accrued in and about said suit up to the time when said appeal or writ of error is prayed; and also enter into bond with one or more securities, in a sum sufficient to cover all the costs which may accrue in the prosecution of said appeal or writ of error, conditioned to pay the same if the judgment, sentence or decree of the court shall be affirmed." (Thomp. Dig., Sec. 5, page 447.)

Geo. G. McWhorter for the Motion.

The Attorney-General, contra.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The defendant in error in this case moves to dismiss the writ of error, upon the ground that the State has failed to give the statutory bond. It is insisted by defendant in error that while there may not be a judgment against the State without her consent given in a legal manner, still the State, when she enters her own courts as a plaintiff seeking judicial remedies, must conform to the general statutory requirements of practice which she has prescribed by the legislation controlling the subject.

On the other hand, the State here insists that the statute construed according to the rules of construction prevailing in other courts in cases of like nature, must be held not to embrace the State. Again it is insisted, no provision being made by the Legislature authorizing any officer to give

a bond, that to give such a construction to the act as requires a bond from the State, would result in a denial of justice to the State, would be to require of it something which it cannot do, and to make it impossible under existing statutes for the State to sue out a writ of error in any case. A construction attended with such consequences, it is contended, should not be given.

We do not think the general statute controlling the subject of costs in writs of error regulates the right of the defendant in error, where the State prosecutes such writ. Looking to all of the legislation of this State upon the subject of costs, the only reasonable construction to be given to this statute is such as will not embrace the State in its provisions. This is a general statute not naming the State. It requires generally a payment of costs accrued and a bond for costs to accrue of the original plaintiff prosecuting the writ. There are particular statutes naming the State which regulate the matter of costs in State cases, civil and criminal. By them the rights of a defendant in error as to costs against the State are secured, and the method of their collection is prescribed. These statutes control this subject. They require no bond of the State, for costs in any judicial proceeding. They prescribe another and different right and remedy as to costs, and constitute the measure of the obligation and duty of the State, as well as the measure of the right of parties engaged in litigation with it.

It is the rule of the common law that costs are payable by each party during the progress of the cause. This rule as to services performed for the State in its own courts does not prevail, because the statutes regulating the matter provide for an auditing of verified accounts by the Comptroller and their payment by the Treasurer upon warrant. So also this rule of practice prescribed by a general law requiring bond for costs is not applicable to the State, as there

are other statutes prescribing other methods of obtaining costs of the State when she is liable therefor. We find but one case covering the question, and that sustains the conclusion we reach. (5 Cal., 389.)

Motion denied.

THE STATE OF FLORIDA, PLAINTIFF IN ERROR, VS. SAMUEL RUSHING, DEFENDANT IN ERROR.

1. In an action upon a bond of a Revenue Collector to recover of a surety in the bond, money received as taxes upon the assessment roll in his hands, to which roll the Assessor has neglected to annex a warrant directing the Collector to enforce the collection of taxes, the sureties are liable for the default of the Collector to pay over, according to law, the money so collected.

2. The want of a warrant only excuses the Collector from proceeding to enforce the collection by levy and sale of property, but taxes voluntarily paid to him must be accounted for as required by law, and his default in such case is included in the condition of the bond.

3. Where a defalcation of a Collector of Taxes occurred under a previous term of office, though known to the officers of the State and not known to a surety of the Collector on his bond given on a subsequent appointment, the omission of the State officers to notify the surety that such previous default had occurred is not a fraud or a fraudulent concealment of the fact by the State or its officers, and constitutes no defence to the surety in an action upon his bond for a subsequent default.

Writ of error to the Circuit Court for Santa Rosa County.

The facts of the case are stated in the opinion of the court.

The Attorney-General for Plaintiff in Error.

The plaintiff in error submits respectfully that the Circuit Court erred in overruling the demurrer to the second plea of the defendant.

The declaration charges a failure to pay over moneys collected by the principal in the bond, who was Collector of Revenue of Santa Rosa county. Cooley on Tax., 500; Orono vs. Wedgewood, 44 Maine, 49; Johnson vs. Goodrich, 15 Maine, 29; State vs. Woodside, 8 Iredell, 104; N. H. Savings Bank vs. Varnum, 1 Met., 34; Williamstown vs. Willis, 15 Gray, 427.

The second plea is bad, and the demurrer should have been sustained.

The plea merely alleges a wilful neglect upon the part of the principal to pay over moneys existing at the time the bond was signed and known to the State, but not known to the defendant in error.

The following authorities show that this is no such case of concealment from a surety as relieves him. There is no charge of fraud in the plea. 1 Story's Eq. Jur., §325 (a); Hand vs. Grede, 34 Ind., 18; Moss vs. Riddle, 5 Cranch, 351; 2 Kent Com. 643, (Comst. Ed.); Burks vs. Wonterline, 6 Bush, 20.

The creditor is not bound to inform the intended surety of matters affecting the credit of the debtor, or of any circumstances unconnected with the transactions in which he is about to engage, nor is it averred that the State was aware that the defendant was ignorant of the facts complained of. McGehee vs. Manhattan Life Ins. Co., 2 Otto, 93.

There is nothing in the plea to show that the defendant sought for information on the point from the State, and that the State failed to disclose it.

Geo. G. McWhorter for Defendant in Error.

Sureties are favorites of courts of common law. Febl. on Guaranty and Suretyship, page 125 and note.

Concealment of a fact surety should know is a fraud. Story Eq. Juris., Vol. I., 215 and 324; Bouvier's Inst., Vol. 4, p. 174; 9 Ala., 42.

The fact concealed was that Butler was a defaulter for previous taxes collected during his former term as Tax Collector.

A surety is only bound for the official action of his principal. 2 Ala., 728; 29 Ib., 147 and 165; 53 Ib., 807-8; 13 Ib., 529.

Official action is action in pursuance of or within authority in his hands, (23 Ala., 807-809,) is the law with regard to Sheriffs. The statute requires written authority (the warrant from the Assessor) to be delivered to Collectors. (Acts 1874, Chap. 1976, Sec. 36.) The duties of the two are analagous, and are governed by similar principles of law.

The warrant was necessary to enable the Collector to collect; without it he was a trespasser. No question is made anywhere of this doctrine. (Cooley on Taxation, page 292, Sec. 37; Chap, 1976, Laws of Florida.)

If the warrant is only to instruct the Collector as to persons and amounts due from them, why is it necessary to instruct him the second time as the statute requires? And if this is the only purpose, the tax roll would be amply sufficient.

The power given to Collectors under Sec. 42 of said act was absolutely essential; without it he would have no authority to levy and sell. But it does not authorize him to collect without warrant. Without it the mere authorizing the Assessor to command him to collect would not confer such a power on him. This construction makes every part of Chap. 1976 operative.

Sec. 42 confers the power by act of Legislature on Collector which the Sheriff holds from the common law, and renders the analogy between the two complete.

THE CHIEF JUSTICE delivered the opinion of the court.

This is a writ of error to the judgment of the Circuit Court for the county of Santa Rosa.

The declaration alleges that defendant as surety for John W. Butler executed with Butler and delivered to the State of Florida a bond dated Sept. 1, 1874, whereby he bound himself in the sum of three thousand dollars, with a condition reciting that said John W. Butler had been appointed Collector of Revenue in and for the county of Santa Rosa and State of Florida for the term of two years, and that the said Butler "shall diligently and faithfully perform all the duties of his said office by the faithful collection of all taxes, both State and county, and the prompt payment of them to the State and County Treasurer, as prescribed by law."

And the plaintiff avers that the said John W. Butler, as Collector of Revenue of the county of Santa Rosa, did not diligently and faithfully perform all the duties of his said office in this, that he did not collect $6,919.98 of taxes assessed for and in behalf of the State of Florida for the year 1874; and second, that he did not pay over to the Treasurer of the State of Florida the sum of $6,919.98 of taxes aforesaid for and in behalf of the State of Florida for the year 1874; and third, that he did not pay over to the Treasurer of the State of Florida the sum of $6,919.98 of the taxes due the State of Florida collected by him for the year 1874 as Collector of Revenue of the county of Santa Rosa, State of Florida; and fourth, that the said Butler failed to collect taxes due the State of Florida assessed for the year 1874, to-wit: $3,829.51, for State

taxes and certain general and special sinking fund and interest taxes, school fund and license taxes, amounting in all to $6,919.98.

The defendant pleaded several pleas, among which were:

Second. "That the Tax Assessor for the year 1874 never annexed to the assessment roll delivered to said John W. Butler, nor otherwise delivered to said Butler a warrant commanding and authorizing him to collect the revenue of said county for the year 1874." *Fifth,* "that the said John W. Butler was Collector of Revenue of Santa Rosa county for the years 1872 and 1873; that said Butler wilfully neglected to make payment to the Treasurer of the State of Florida all moneys collected by him on account of the State taxes for the year 1873, which fact was well known to plaintiff at the time of his appointment by plaintiff, as alleged in his said declaration; and said defendant alleges that at the time of signing said bond he was unaware of the wilful neglect of said Butler, as aforesaid."

To the second plea the plaintiff demurs, on the ground that it does not allege that Butler did not as Collector of Revenue receive from the Assessor of Santa Rosa county the tax books of 1874 and collect the revenue assessed in behalf of plaintiff upon said books, and failed to pay the same to the plaintiff as alleged; and that it is argumentative. And as to the fifth plea, the plaintiff demurs and says that it is not good in law, because it does not state facts sufficient to constitute a defence and is argumentative.

The court overruled the demurrers to the second and fifth pleas, and thereupon judgment was rendered in favor of the defendant upon the cause of action set out in the declaration and for costs.

To this judgment the plaintiff sues out a writ of error, and assigns as error the judgment overruling the demurrer to the second and fifth pleas.

As to the second plea, it is simply that there was not

annexed to or accompanying the assessment roll delivered to Butler as Collector of Revenue a warrant commanding, or authorizing him to enforce the payment of the taxes of 1874.

This plea is not responsive to any allegation in the declaration. It is not therein alleged that a warrant was placed in his hands. The plea admits that a tax roll was placed in the collector's hands for that year, and the declaration alleges that the collector received thereon, of taxes due the State, the sum of money demanded, which he failed to pay over to the State Treasury as he was required by law and by the condition of the bond to do.

Here is an allegation that the Collector received on the assessment roll of 1874 a large amount of money of taxes levied for the use of the State, the Collector being the person authorized by law to receive the taxes so assessed, and to secure the payment to the State of this money the bond in question was executed. Yet when it is demanded that he shall pay over this money to the Treasury, the surety pleads that the Collector had no warrant authorizing him to enforce the collection of these taxes, and the surety is, therefore, not liable to the State upon his bond.

The statutes require the Assessor to deliver to the Collector the assessment roll, with the amount of taxes due from the several persons and upon the property enrolled therein designated, and also that the Assessor deliver a warrant directing and authorizing him to levy upon property to satisfy the several taxes in case the persons taxed neglect or refuse to pay the same. Without this warrant or process the Collector could not be required to enforce the collection of the taxes by levy and sale of property, and the Collector would not probably be liable for neglecting to collect the taxes; but if tax-payers voluntarily pay to the Collector the amount of taxes due from them upon the assessment roll in his possession, his act in receiving the

money is an official act, and his receipt is a discharge of the taxes levied as completely as though the warrant had been issued to him. The moneys he so received are taxes, without reference to the warrant. The assessment and apportionment of the amount of money required for public purposes by the proper officers, in the manner and time provided by law, gives this money the character of taxes, and it is this money that the bond is intended to secure.

It has been held in numerous cases that where sureties undertake that a Tax Collector shall pay over moneys collected by him by virtue of his office, they are liable for the moneys so collected whether with or without a warrant, and without regard to any irregularity in the tax list or warrant, the taxes having been voluntarily paid to him, (Johnson vs. Goodridge, 15 Me., 29; Ford vs. Clough, 8 Greenl., 334; Orono vs. Wedgewood, 44 Me., 49; Williamston vs. Willis, 15 Gray, 427,) and while the Collector is bound to account for all sums voluntarily paid to him by persons taxed, it is always a defence to him and his sureties where he has neglected to proceed that he had no warrant, or that the process was void. (Cooley on Tax., 500, and authorities cited.)

Upon the facts stated in the pleadings the sureties are liable, and the demurrer to the second plea should be sustained.

The fifth plea, that Butler as collector of taxes under a former appointment had wilfully neglected to pay over taxes by him collected for the State for the year 1873, of which fact the State was aware, but of which the surety was not aware at the time of the later appointment, under which the bond was given, is made the basis of an argument that the defendant's surety was defrauded by the concealment of a fact which the State was bound to disclose.

But this plea falls far short of showing that he was induced by the State by concealing a fact to sign the bond.

It is not pretended that the State invited, or induced him to become surety for Butler. It by no means follows that when the bond was offered for approval, it was the duty of the State by its officers to seek the surety and inform him of a fact which may, or may not, have influenced him. However unwise it may have been to reappoint a defaulter to the same office, there was in this circumstance no evidence that the State or its agents had perpetrated a fraud upon the surety by concealing a fact. Nothing was concealed by the State. On the contrary, it is presumed that the public records were open for the information of all, and the integrity of the official, or the want of it, was in this respect open to all who might be inclined to inquire into it. The fact that the principal had held the same office in the county should have put the surety upon inquiry as to whether the officer was worthy of credit. But it is enough to say that the plea does not set up a fraud on the part of the plaintiff or its agents. Concealment implies design, and even if the State might by any possibility be a party to a fraud, no design is implied from the language of this plea.

Fraud consists of false representations of things as facts which are not such, or deceitful concealment of facts. (Grove vs. Hodges, 55; Pa. St., 504.) There is nothing in this plea which should be construed as charging fraud, even were the plaintiff a private person or held to the rules governing the good conduct of private persons. This plea, therefore, fails to allege facts constituting a defence, and the demurrer should have been sustained.

The judgment is reversed and the cause is remanded with directions that judgment be entered upon the demurrer, that it be sustained as to the second and fifth pleas, and for further proceedings in the cause according to law.

JOHN T. SNELL, PLAINTIFF IN ERROR. VS. IRVINE AND DENSLER, DEFENDANTS IN ERROR.

The Clerk, in ascertaining the amount which the plaintiff is entitled to recover in an action upon an open account, must act upon proofs produced and filed upon entry of the default, and the record must disclose this fact.

Writ of error to the Circuit Court for Madison county.

The defendants in error, E. W. Irvine and N. N. Densler, who are partners, were plaintiffs in the Circuit Court. The default for failure of the defendant to appear or plead was entered by the clerk on the first Monday of December, A. D. 1878, and the final judgment was rendered by the clerk on the 13th day of the same month in favor of the plaintiffs for $140.08 and costs. Snell applied for and obtained a writ of error returnable to the present term.

The other facts of the case are stated in the opinion of the court.

Angus Patterson for Appellant.

J. N. Stripling for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is a writ of error to the Circuit Court for Madison County. The action was assumpsit upon an open account. An attachment was issued in the case based upon affidavit. The summons was returnable to the first Monday of December, 1878. On that day a declaration was filed and a default was entered for want of appearance. An account unsworn to, marked exhibit A, was filed with the declaration. On the 13th day of December a final judgment was

entered. No affidavit or other proof appears to have been filed or taken on that day or upon any day subsequent to the default. The record recites simply, "the plaintiffs having produced their cause of action and the damages having been duly assessed by the clerk at one hundred forty 8-100 dollars, it is considered," &c. This was the amount of the unsworn account filed with the declaration as well as the debt sworn to in the affidavit accompanying the attachment proceedings. It does not appear from this record how and in what manner the clerk assessed the damages. The record recites a simple production of the cause of action, the unsworn account. The statute provides that upon the entry of any default where "the action is upon a written instrument for the payment of money, the plaintiff at any time after such default may, on the production and filing of such instrument, cause final judgment to be entered for the amount thereof with interest, and the clerk shall assess," &c. "And if the action is upon an open account or other contract for the payment of money not in writing, upon the entry of a default as aforesaid the clerk shall ascertain the amount which the plaintiff is entitled to recover in such action from the examination of the plaintiff under oath, or other proofs by affidavit or otherwise, and enter up the judgment for the amount so assessed or ascertained."

A proper construction of this statute, we think, requires that the party should produce and file the evidence upon which the damages are to be assessed where the action is upon an open account in the same way as he is required to do in an action upon a written instrument, that is in the regular method after entry or default. The statute does not in terms prescribe the method by which the clerk shall "ascertain" the amount, but we think the Legislature contemplated the same method in each case, and we think this the correct construction of the section of the statute.

In this case there was nothing filed, and looking to the proceedings subsequent to the entry of the default, we cannot say that the clerk assessed the damages otherwise than by reference to the open account filed with the declaration. We think the record should show the basis of the judgment—the production and filing of the proof after default entered. Nothing of the kind appears here.

The judgment is reversed and the case will be remanded to stand upon the default for want of an appearance.

W. A. C. BENBOW, APPELLANT, VS. MARQUIS & Co., APPELLEES.

Where it is clear, looking to the statutes regulating the terms of the Circuit Courts, that a bond given in an appeal from a judgment at law was executed more than thirty days after the session of the court at which the judgment was rendered, the appeal will be dismissed.

Appeal from the Circuit Court for Santa Rosa county.

The appellees, George Marquis and Frederick Fisher, partners doing business under the style of Marquis & Co., the plaintiffs in the Circuit Court, in whose favor the final judgment was rendered, moved to dismiss the appeal, on the ground that no appeal bond was filed by the appellant in the time prescribed by law. The other facts are stated in the opinion of the court.

Geo. C. McWhorter for the Motion.

Geo. P. Raney, contra.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This was an action of replevin in the Circuit Court for Santa Rosa county, tried at Spring Term, A. D. 1879.

It appears from the record that notice of appeal was given on the 15th of May, A. D. 1879, the judgment having been rendered and entered on the 3d of April, 1879. The bond was executed on the 5th of June, 1879, and filed the same day. The time in which appeals "can be taken and perfected" from the Circuit Court to this court is thirty days after the "session of the court" at which the judgment "was rendered or pronounced." Under the statutes regulating the time at which the terms of the First Circuit are to be held, (Chap. 3117,) the term for Escambia county commences on the second Monday of April, which was the fourteenth day of the month, and the regular term for Santa Rosa county, which is the term immediately preceding the term for Escambia, could not have extended beyond or have included the first day of the term for Escambia. It is therefore clear that under the statute the bond here given could not have been given in thirty days after the session of the court at which the judgment was rendered.

The court could not dispense with the requirement of the statute.

We have frequently held that a bond is necessary to perfect an appeal in judgments at law. The bond here not having been filed in that time, the appeal was not perfected in accordance with law, and for that reason must be dismissed.

Motion granted.

LUTHER MCCONIHE, MAYOR OF JACKSONVILLE, ET ALS., APPELLANTS, VS. THE STATE OF FLORIDA, EX REL. P. E. MCMURRAY, ET ALS., APPELLEES.

1. Under the statutes in force in this State anterior to 1879 two classes of municipal corporations were established; first, a city to contain at least three hundred registered voters; second, a town to contain less than three hundred registered voters. A statute of 1879 created a third class, to contain sixteen hundred or more registered voters, leaving it discretionary with all cities having that number of voters to become a city of the third class, or to remain a city under the preceding statutes. The class created by the act of 1879 was to have powers and privileges different from the powers conferred upon the other classes: *Held,* That the statute of 1879 was a statute "regulating municipal business" within the meaning of Sec. 17, Art. IV. of the Constitution; that such a law must be "general and of uniform operation throughout the State," (Sec. 18, Art. IV., Con.); that this statute was unconstitutional in that it wanted such "uniform operation throughout the State," and also because it could not constitute a part of a "uniform system of municipal government" as required by the Constitution. (Sec. 21, Art. IV.)

2. Where, in response to an alternative writ of mandamus directing the officers of a municipal corporation to show cause why they do not call an election for their successors in office, the respondents set up in defence legislative action extending their time, it is proper for the court to determine the constitutionality of the legislative action by virtue of which they claim it is not their duty to order the election.

3. The determination of the constitutional question mentioned in the last note does not involve any judgment of ouster or determine the right of any party to any office. The respondents are treated as *de facto* officers, and the only judgment to be rendered in the cause is one directing the performance of a ministerial duty.

4. In such a case the interest is common to all of the corporators, the duty is a public duty, the relief sought is not the enforcement or protection of a private right, and corporators of the municipal organization have a right to a mandamus in the name of the State.

5. It is no objection to awarding the writ that the time for the per-

formance of the duty has passed, as it is only in case of default in performance at this time that a mandamus can issue.

The Legislature of Florida, during its session of 1879, passed an act entitled "An act entitled an act to amend an act to provide for the Incorporation of Cities and Towns, and to establish a uniform system of Municipal Government in this State, approved February 4, 1869, and to further provide for the organization and government of cities," which act was approved March 3, 1879. The fourth section of this act, which provided for some radical changes in the form of municipal organization established by the act of 1869, was made applicable only to such cities containing not less than 1,600 registered voters as should elect to accept its provisions, and the mode of acceptance was specified in the ninth clause of said section, as follows:

"Any city now containing sixteen hundred or more registered voters, which may elect to accept the provisions of this section, so far as the same may change in any manner its existing form of municipal organization and the election of its municipal officers, shall, before the date of its next annual election, as now provided by any ordinance of said city, declare such acceptance by ordinance duly passed according to law, whereupon such change shall take effect on and after its first annual election thereafter, to be held on the second Tuesday in December, as hereinbefore provided."

The fourth clause of said section required the annual election for municipal officers to be held on the second Tuesday in December, prohibited any general election before that date, and provided that, in the interim, the officers then in office should continue to exercise the powers and perform the duties of the offices held by them. The fourth clause reads as follows:

"The second Tuesday in December shall be the regu-

lar annual period for the election of aldermen, and of all municipal officers elected by the registered voters. Aldermen shall be voted for on a general ticket with the officers required by this section, by the registered voters of the city at large. The term of office of the aldermen and officers so elected shall commence on the first day of January following, and the official or fiscal year for all cities shall commence on the first day of January and end on the thirty-first day of December of each year. The term of all aldermen and municipal officers, provided for in this section, of all cities which shall accept the provisions of this section, now in office, which shall expire before the first day of January next, to-wit: the first day of January, 1880, is hereby extended to that date, anything in any ordinance of any city fixing the day of election at any other date to the contrary notwithstanding; and no general municipal election shall be held by any city now incorporated, which shall accept the provisions of this section, until the second Tuesday in December, 1879, and the term of all officers not provided for under this section shall expire at the end of the year for which they were elected."

After the passage and approval of this act on the 4th of March, 1879, the city council of Jacksonville passed an ordinance accepting the provision of said section four, and, in accordance with its requirements, changing the date of the annual election for municipal officers from the first Monday in April to the second Tuesday in December, and, consequently, when the first Monday in April arrived, no election was called or held, but the officers then in office continued to discharge the duties of the respective offices held by them.

About the 23d of April, 1879, P. E. McMurray and others presented a petition to Hon. R. B. Archibald, Judge of the Circuit Court of the 4th Judicial Circuit in and for Duval county, praying for a writ of mandamus to compel

the Mayor, Council and Clerk to arrange for, call and hold an election for municipal officers in accordance with the provisions of the old ordinance providing for elections, based upon the act of 1869, which had been repealed by the ordinance of March 4, based upon the act of 1879.

The judge thereupon granted an alternative writ, commanding those officers to do as requested, or to show cause why they should not.

The writ set out, at length, the suggestions of the relators, made in their petition, which were in substance that the respondents, the Mayor, Aldermen and Clerk, were duly elected to their respective offices on the first Monday in April, 1878, to serve for one year from that date, and that by law and the operation of the ordinances of the city, their terms of office expired on the first Monday in April, 1879; that by virtue of an ordinance of the city of Jacksonville, approved February 8, 1878, (adopted in pursuance of the act of 1869,) regulating elections, and which ordinance was alleged to be still in force, an annual election was required to be held on the first Monday in April of each year, and the respective duties of the Mayor, Aldermen and Clerk, with regard to the calling and holding of such election, were prescribed; that the first Monday in April had elapsed and no election had been held, but the respondents had neglected and refused to call, arrange for or hold such election, and still continued to hold, exercise and enjoy their several offices respectively.

That the pretext under which the respondents seek to justify their failure to hold an election on the first Monday in April, *and upon which they found their claim of title to the offices they hold,* is the ordinance accepting the provisions of section four of the act approved March 3, 1879.

That the Mayor and City Council had no power to accept the provisions of section four of the act of 1879, but the same should have been submitted to the registered

voters, and the doings of the respondents in adopting t said ordinance and in the retention of their several offic constitute a flagrant usurpation.

Relators further aver and *offer to prove* that there we not 1,600 registered voters in Jacksonville at the date said act, and therefore said city was not within the sco and operation of said act.

The respondents appeared and moved to quash the w on the following grounds:

1. Because it does not appear from the writ that the r lators have a clearly established legal right to the reli prayed for, or that the alleged duty required to be pe formed by the respondents is a clear and specific legal du which ought to be performed by them.

2. Because it is apparent upon the face of the writ, th the issue presented involves a determination of the rig of the respondents to exercise the functions of the sever offices respectively held by them.

The motion to quash being overruled, the responden made a return to the writ, which was in substance as fo lows:

Respondents admitted that they were elected to their r spective offices at the time alleged in the writ, but deni that by law, or the operation of any ordinance then force, their terms of office expired on the first Monday April, 1879; they denied that the ordinance regulatir elections, adopted September 8, 1878, had since been ar still was in force; they admitted that they had not called, a ranged for or held a general election on the first Monday April, 1879, and denied that any law or ordinance, then force, required them so to do. For further answer they a leged that the city of Jacksonville had accepted the pr visions of section four of the act of March 3, 1879, by a ordinance duly passed, and that the council had lawful pow and authority to accept such section; they denied that th

city of Jacksonville did not contain 1,600 registered voters, and alleged that by the said act they were prohibited from calling, arranging for or holding any general election before the second Tuesday in December, 1879.

The relators joined issue on the question as to whether or not there were 1,600 registered voters in the city at the date of the approval of the act, and demurred to the rest of the return. The grounds of their demurrer were,

Because respondents admit that they were elected at the time alleged, and therefore by the general municipal law of the State, their term of office expired on the first Monday in April, 1879, as they could only continue in office "for one year from the date of their election."

Because no provision of the act of March 3, 1879, which is not repugnant to the Constitution, justified the failure of respondents to call an election.

Because the City Council had no power to accept for the city the provisions of said section 4, and therefore the ordinance of March 4, 1879, is void.

Because no constitutional provisions of the act of March 3, 1879, or of the ordinance of March 4, 1879, did or could operate to take away the power theretofore conferred upon the respondents to call and hold an election on the first Monday in April, 1879, or authorize them to postpone said election to the second Tuesday in December, 1879.

After argument upon the demurrer, the relators withdrew their allegation that the city did not contain 1,600 registered voters at the time stated, and rested their case upon the demurrer alone.

The court sustained the demurrer and entered judgment against the respondents, and ordered a peremptory writ to issue.

From this judgment the respondents appealed.

E. M. Cheney for Appellants.

The first exception taken was to the decision of the C cuit Judge overruling the respondents' motion to quash t alternative writ. This motion was properly made. Ev ett vs. People, 1 Caines, N. Y., 8; High on Ex. Remedi tit. Mandamus, sec. 521-522.

First ground. The alternative writ does not show a certain, clear and specific legal right on the part of t relators, or any clear and specific legal duty on the part of respondents. Fitch vs. McDairmaid, 26 Ark., 482; rington vs. Van Houton, 44 Ala., 284; Reading vs. Co monwealth, 11 Penn. St., 196; Com. vs. Pittsburg, 34 Pe St., 496; Draper vs. Noteware, 7 Cal., 276; Napier vs. P 12 Ga. 170; People *ex rel.* Stevens vs. Hayt, 66 N. Y., (Sick.,) 606; People vs. Board of Police, 35 Barb., 535; M Dougal vs. Bell, 4 Cal., 177; State vs. Warren Co., 32 J. (L.,) 439. High Ex. Rem., tit. Mandamus, sec. High Ex. Rem., tit. Mandamus, sec. 10. People Mayor of Chicago, 51 Ill., 28; People vs. Mayor of C cago, 1 Wend., 318; 2 Dillon, Municipal Corp., sec. 6 U. S. vs. Bank of Alexandria, 1 Cranch, C. C., 7; Peo vs. Judges, 1 Doug., (Mich.,) 319; Williams vs. Judges, Mo., 225; State vs. Graves, 19 Md., 351; Smith vs. Chica R., 67 Ill., 191; High Ex. Rem. tit. Mandamus, sec. 9 a note; State vs. Supervisors, 2 Chand., 250; 45 Vt., 7; Ill., 419; 51 Ill., 28.

The writ of Mandamus should not be allowed in ca involving numerous questions of law and of fact. (U. S. Commissioners, 5 Wall., 563.) "And where substant doubt exists as to the duty whose performance it is sought coerce, or as to the right or power of the officer to perfo the duty, the relief will be withheld." High Ex. Rem., t Mandamus, sec. 32; Field on Corp., sec. 502, Ed. 1877.

"As a general rule mandamus will not be granted wh

the right depends upon holding an act of the Legislature unconstitutional." People vs. Stevens, 2 Abb., Pr., (N. S.,) 348; Hall vs. Supervisors, 20 Cal., 591; Smyth vs. Titcomb, 31 Me., 272.

A very slight examination of the alternative writ in this case shows that it does not fulfil the conditions laid down by High, and sustained by all the adjudicated cases, for it does not show a *clear* legal right on one side and a *clear* legal duty on the other side.

A direct issue, involving numerous questions of law and fact, is thus presented upon the face of the writ itself.

If the issue presented by the pleadings is an issue which can properly be adjudicated in a mandamus proceeding, the court may decide the issue preliminary to granting or refusing peremptory writ, but if the case is one *not* properly within the scope of a proceeding of this nature the court should dismiss the alternative writ.

The questions presented by the pleadings were:

1. The right of the corporate authorities of the City of Jacksonville to exercise the rights, privileges and franchises granted by section 4 of the act of 1879.

2. The validity of the respondents' claim of title to the offices which they held.

As neither of these questions could be adjudicated by proceedings in mandamus, even after return made, the right of the relators and the duty of the respondents could not be determined, and the consequent substantial doubt barred the granting of the writ.

This case certainly involves numerous questions of law and of fact, and moreover, the alleged right of the relators depends upon holding an act of the Legislature unconstitutional, therefore the writ will not lie.

Second ground. It is apparent on the face of the alternative writ that the issue presented involves a determination

as to the title of the respondents to the offices held by them.

"Where an office is already filled by an actual incumbent, exercising the functions of the office *de facto* and under color of right, mandamus will not lie to determine the disputed question of the title, and whenever it is apparent on the face of the pleadings that the issue presented involves a determination as to the person entitled to exercise the functions of an office, the writ of mandamus will be withheld." High on Ex. Rem., tit. Mandamus, secs. 49, 50, 51, 53, 67, 77, 401, 73, 52; 2 Dillon Municip. Corp., sec. 674.

"The right of a public officer to discharge the duties of his office cannot be inquired into collaterally, but only in a direct proceeding instituted for that purpose." Johns vs. People, 25 Mich., 499; Eaton vs. Harris, 42 Ala., 491; Gumberts vs. Adams Ex. Co., 25 Ind., 181; State vs. Lewis, 22 La. Ann., 33; Cooper vs. Moore, 44 Wis., 386; Kaufman vs. Stone, 25 Ark., 336.

Officer *de facto*. "All that is required where there is an office to constitute a person an officer *de facto* is that he claims the office and is in possession of it, performing its duties under color of election or appointment, although such election or appointment be not valid. Buckman vs. Ruggles, 15 Mass., 180; State vs. Carroll, 38 Conn., 449; Petersilia vs. Stone, 119 Mass., 465; Com. vs. McCombs, 56 Penn. St., 436; 2 Dillon Municip. Corp., section 668, 716; Winslow vs. Moseley, 35 Mo., 146; State vs. State Auditor, 34 Mo., 375; People vs. Bremen, 45 Barb., 457.

"The title to office must be tested on *quo warranto* and cannot be questioned collaterally." People vs. Fletcher, 2 Scam., (Ill.) 487; People vs. Kis, 4 Cow., 382, note; Lewis vs. Oliver, 4 Abb. Pr. Rep., 121; St. Louis Co. Court vs. Sparks, 10 Mo., 167.

Quo warranto is the proper remedy for usurpations of

municipal offices. Mandamus will not lie to try title to office. 2 Dillon Municip. Corp., sec. 680; Underwood vs. Wylie, 5 Ark., 248; Bonner vs. State, 7 Ga., 473; People vs. Stevens, 5 Hill, 615; People vs. Detroit, 18 Mich., 338; Brown vs. Turner, 70 N. C., 93; Denver vs. Hobart, 10 Nev. 28; Meredith vs. Supervisors, 50 Cal., 433.

The writ (in connection with the act of March 3, 1879, referred to therein) shows that there is no actual or constructive vacancy in the city offices, but that the respondents are the *de facto* officers of the city, claiming under color of right for a limited term, to-wit: until January 1, 1880; that the relators dispute their claim of title and claim the right to a new election to oust the respondents and refill at once the offices now filled by them.

The reason given by the respondents for refusing to call an election, is because *they themselves are entitled to continue in office.* The question then directly presented is, are the respondents entitled to continue in office or not?

The very act which the relators demand that the respondents shall be required to perform, would, if performed, oust the respondents from their offices. Whether they should be ousted or not depends upon whether their title to their offices is valid or not, and therefore the validity of the respondents' title to office is the first and the only question presented for decision.

Upon the case presented by the pleadings, that is by the alternative writ, the alleged usurpation of offices by the respondents is the only issue to be determined, and the granting of a peremptory writ would be in effect a determination as to the respondents' title to office, and a judgment of ouster against them.

The demurrer to the return alleges that no provision of the act of March 3, 1879, which is not repugnant to the Constitution, justified the failure of the respondents to call an election on the first Monday in April, 1879; that the

terms of office of the respondents expired on that day b virtue of the general municipal laws of the State applic ble to the city of Jacksonville, and that section four of tl act of March 3, 1879, had never been accepted by the cit because the city council held no power to accept it.

The provision of the act of March 3, 1879, which change the day of the annual election to December, 1879, and co tinued the respondents in the offices then held by them u til that date, are contained in clause four of section four said act.

The mode in which any city shall accept the provisio of section four of said act is prescribed in clause nine said section.

Two questions then, *and two only*, are raised by this d murrer:

1. Are the provisions of clause four of section four co stitutional?

2. What is the proper construction to be placed upo clause nine of section four?

If mandamus cannot issue when the right of the relato depends upon holding an act of the Legislature unconstitu tional, or upon a determination as to any title to office, the the first question need not be discussed, and the only que tion presented to the court by this demurrer is as to th validity of the acceptance of section four by the city cou cil of Jacksonville. This is simply a question of construc tion.

ACCEPTANCE OF SECTION 4.—The language of the nint clause of section four is so plain that it can bear but on reasonable construction, and that is, that the city counci acting for the city, should accept and declare such accept ance by ordinance.

The act of declaring such acceptance by ordinance wa the act of acceptance itself.

Counsel for the relators claims that the word "declare

is insufficient to delegate to the council the power to accept, and that it simply authorized the council to "publish or make known" the fact of an acceptance by the registered voters.

This claim is untenable for two reasons.

1. Because there is nothing in the clause which either directly or indirectly authorized or seems to contemplate a popular election. 2. Because the phrase "declare by ordinance," as here used, is amply sufficient to delegate the power of acceptance to the city council.

The word "declare" is used in the same manner and for the same purpose in the Constitution of the United States, as follows: "Congress shall have power to *declare* war." (U. S. Const., Art. 1, Sec. 8.) "Congress shall have power to *declare* the punishment of treason." (U. S. Const., Art. 3, Sec. 2.)

If this court should entertain the question of constitutionality, the appellants would offer the following authorities in support of the act of March 3, 1879:

LEGISLATIVE CONTROL.—The power of the Legislature over municipal corporations, to create and to abolish them; to change their boundaries; to alter or amend their charters, and to abridge or enlarge their powers, is absolute and without limitation, except when limited by constitutional restrictions. 1 Dillon Municip. Corp., Sec. 30, 36-40; Cooley Const. Lim., Secs. 190-3; Ibid., Secs. 235-36, note 4.

The Constitution of this State gives to the Legislature exclusive power to provide for the incorporation of cities and towns, and absolute control over them, subject only to two restrictions—*first*, that all laws for municipal corporations shall be general and of uniform operation throughout the State; *second*, that the Legislature shall not create any office the term of which shall exceed four years.

The Legislature also (with the restrictions heretofore re-

cited) had absolute power over the terms of office of muni cipal officers, and the provision in this clause, extendin the term of office until the date of the annual election pro vided for in the same clause, was strictly within the scop of its authority. 1 Dillon Municip. Corp., 168; Peopl vs. Merrill, 11 Wend., 563; Smith vs. New York, 37 N Y., 518; Cooley Const. Lim., Sec. 276.

Counsel for relators, in support of his position that th Legislature cannot *extend* the term of office of municipa officers, relies upon the case of Fowler vs. Bull, 46 N. Y. 57. If this case is applicable to the case at bar, it is in di rect conflict with all the authorities cited above, *and is th only reported case* which does conflict with them. It doe not in reality, however, conflict, because the office in ques tion in that case was a *judicial office created by the Constitu tion,* the Legislature simply having power to fix the tern of office, while in the case at bar the office is a municipa office *created by and within the absolute control of the Legisla ture.*

The case of People vs. Bachelor, (22 N. Y., 128,) whic is directly in point, and which decides that the Legislatur has power to extend the term of office of municipal officer by the repeal or modification of an act providing for th election of their successors, is expressly affirmed in the cas of Fowler vs. Bull, showing that these two cases, applyin to different classes of officers *and different circumstances,* d not conflict.

It will also be observed that the case of Fowler vs. Bu expressly declares that the Legislature may change the da of election.

But, by the act of March 3, 1879, the Legislature ha neither created a new term of office, nor extended an ol term.

The act of 1869 and the ordinance based upon that act provided that the municipal officers should hold their office

for one year, *and until their successors are elected and qualified.* This meant, of course, elected according to law.

The act of March 3, 1879, changed the day for the annual election from April to December, and forbid any annual election before December. There could, therefore, be no legal election befor December.

SPECIAL OR LOCAL LAW.—Another constitutional objection to section 4 has been made by counsel for the relators, this is that because the section is applicable only to a certain class of cities, that is cities containing 1,600 registered voters, and because it is not applicable to *all* such cities, but only to such as shall elect to accept its provisions, it is obnoxious to the clauses of the Constitution which provide that "the Legislature shall establish a uniform system of municipal government," and that "all general laws shall be of uniform operation throughout the State."

Every law is *general* which includes in its provisions all persons or things of the same *genus,* and it is of uniform operation throughout the State, if it operates upon these persons or things equally in every locality. It is not necessary that all persons and things included in a general law should be placed precisely upon the same footing, without regard to differences in their character or capacities, provided all of the same class or kind are treated alike. Neither is it necessary that a general law granting franchises or privileges should be *imperative;* if all persons or bodies corporate of the same class within its provisions are placed upon the same footing, if they choose so to be placed, *and all are given the right to choose,* the law is general in its character and of uniform operation. A *system* is "a scheme, having many parts connected together," "regular order or method." Uniform means "having the same form; consistent with itself." A "uniform system of municipal government," then, means simply one scheme of general application, connecting together many communities; arranging

a regular order or method for these communities, according to their grade or class, (including the grading and classification,) and giving to every community of the same grade or class the *right to enjoy* the same powers and privileges.

It is argued with respect to section four of the law of 1879, that if one city of 1,600 voters should accept the provision of this section, and another of 1,600 voters should not, the municipal organization of these two cities of the same grade would not be the same, and therefore it is not a "uniform system."

This argument ignores the distinction between a *uniform system* and uniform local organizations. The system as a whole—as a general scheme, is one thing, and the different parts of which it is composed are other things. The system adopted by the Legislature of Florida provides two forms of organization for all cities of a certain size, but leaves it optional with each city to choose which form it will adopt, *and this right of choice is as much a part of the system* as is the form of organization that may be chosen. City of Chicago vs. People, 80 Ill., 496; Morford vs. Unger, 8 Iowa, 82; Bank of Chenango vs. Brown, 26 N. Y., 467.

Such, certainly, was not the intention of the framers of the Constitution, and therefore these provisions must be so construed as to avoid the mischief which it was intended to cure, and to enforce the remedy.

Legislature has power to decide when a general law can be made applicable. Nevada vs. Swift, 11 Nev., 128; State vs. Hitchcock, 1 Kansas, 178; 37 Ind., 163; 50 Mo., 317.

A constitutional provision that requires all laws of a general nature to have uniform operation throughout the State, is complied with in a statute applicable to all cities of a certain class having less than 100,000 inhabitants, though, in fact, there be but one city in the State of that class. Walker vs. Potter, 18 Ohio, N. S., 83; Bourland vs. Hildrett, 26 Cal., 162; Cooley Const. Lim., page 129;

Brooks vs. Hyde, 37 Cal., 366; McAunet vs. Mississippi R. R., 20 Iowa, 338-343; Jackson vs. Shawl, 29 Cal., 267; Genlite vs. State, 29 Ind., 419; State vs. Parkinson, 5 Nev., 15; Ensworth vs. Albin, 46 Mo., 460.

As to when a general law can be made applicable: State vs. Squires, 26 Iowa, 340; Johnson vs. R. R. Co., 23 Ill., 202.

Right to choose or acceptance of charter by cities: Affirmative legislation may in some cases be adopted, of which the parties interested are at liberty to avail themselves or not, at their option. (Cooley Const. Lim., 117-118.) "Eminently proper that cities should be heard on the question of their incorporation." Cooley Const. Lim., 118; Bull vs. Read, 13 Grat., 78; 23 Barb., 33.

"Sec. 7. Which provides that the act shall take effect from and after its acceptance by the city council of Muscatine, is not a delegation of its powers by the General Assembly, and so does not render the act invalid under the Constitution." Morford vs. Enger, 8 Iowa, 82; 21 Me., 58; 8 Penn. St., 391; 10 Penn St., 214; 46 Me., 206; 17 Mo., 521; 45 Mo., 458; 17 Cal., 23.

A case precisely in point, (subject fully discussed,) is as follows: "The act authorizing the electors of an incorporated village to determine which section of the general act for the incorporation of villages shall apply to these villages, is valid and constitutional. It is not the delegation of legislative power, but a tender to these municipalities of such specified amendments to their respective charters as they may elect to accept." Bank of Chenango vs. Brown, 26 N. Y., 467.

It is not unconstitutional to delegate to a single locality the power to decide whether it will be governed by a particular charter. Cooley Const. Lim., 120.

Finley & Memminger on the same sade.

E. M. Thompson for Appellees.

The pretext on the part of the respondents for their misfeasance and neglect of duty complained of, is "an act of the Legislature of Florida, approved March 3, 1879," and a pretended ordinance of the City Council, pretended to have been approved March 4th, 1879, which said pretended ordinance by its title and the express provision of its text, assumes to "accept the provisions of section four" of the statute.

The first subject of inquiry here is, is this ordinance valid? The question of its validity is to be resolved by ascertaining as to whether, by any valid statute of the State of Florida, the necessary legislative power was delegated by the Legislature of Florida to the City Council and Mayor of Jacksonville to pass and approve the provisions of this ordinance. There is no trace of such delegation of power in the acts of 1869 and 1871. If it existed at all it must have been conferred by the 9th clause of section 4 of the act of 1879, which reads as follows:

"Any city now containing sixteen hundred or more registered voters, which may elect to accept the provisions of this section, so far as the same may change in any manner its existing form of municipal organization and the election of its municipal officers, shall, before the date of its next annual election, as now provided by an ordinance of said city, declare such acceptance by ordinance duly passed according to law, whereupon such change shall take place on and after its first annual election thereafter, to be held on the second Tuesday in December, as hereinbefore provided."

It is manifest from a mere liberal construction of the terms of this clause that it was the intention of the Legislature to submit to "any city containing sixteen hundred or more registered voters" the option as to whether such

city will accept or reject the provisions of section 4. It was within the power of the Legislature to have enacted this statute and thus to have made it obligatory as an amendment to the general municipal law, without reference to the choice or election of the cities which it affected. But the power of election was conferred, and the section can only be made operative by an "acceptance" as provided.

"Statutes creating municipal corporations or imposing liabilities on municipalities, or authorizing municipalities to incur debts or obligations, or to make improvements, may be referred to the popular vote of the districts immediately affected. In other words, *the people of the district may decide whether they will accept the corporation or will assume the burdens.* This doctrine may be considered the settled law of the whole country, and the same principle has frequently been applied in the case of other and similar local measures." Sedg. Con. Construction, 135; Bank of Rome vs. Rome, 18 N. Y., 38; Starin vs. Genoa, 23 N. Y., 439; Clark vs. Rochester, 28 N. Y., 605; Bank of Chenango vs. Brown, 26 N. Y., 467; Corning vs. Green, 23 Barbour, 33; Grant vs. Courter, 24 Barbour, 232; Robinson vs. Bidwell, 22 Cal., 379; Hobart vs. Supervisors, 17 Cal., 23; Williams vs. Cammack, 27 Miss., 209; Alcorn vs. Homer, 38 Miss., 652; Call vs. Chadbourne, 46 Maine, 206; State vs. Wilcox, 45 Mo., 458; State vs. Scott, 17 Mo., 521; Smith vs. McCarthy, 56 Penn St., 414; San Antonio vs. Jones, 28 Texas, 19; Louisville, &c., R. R. vs. Davidson, 1 Sneed, 637; State vs. O'Neil, 24 Wis., 149; Cotton vs. Leon county, 6 Fla., 610.

How was such acceptance by the city intended to be effected? Was it intended that the ordinance making power of the city should exercise the specified power of election or choice? The word "ordinance" in the connection "any city," &c., shall, &c., declare such acceptance by ordinance, plainly implies some act of the City Council, to

be approved by the Mayor. But the act of "acceptanc would be the exercise of legislative power, and as the C Council is a legislative body, clothed with special, and e tremely limited and closely circumscribed functions, a grant to it of such power must be in plain, direct and p itive terms, and any ambiguity of expression will suff to defeat the presumption of such grant.

"Any fair, reasonable doubt, concerning the existei of power is resolved by the courts against the corporati and the power is denied." 1 Dillon's Municipal Corpo tions, sec. 55.

"All acts beyond the scope of the powers granted i void. Id. and note 1, p. 174; Opin. of Ch. Jus. Shaw, Spalding vs. Lowell, 23 Pick., 71.

"The authority conferred on these subordinate bodies to be strictly construed and must be closely pursued." S on Con., p. 379.

"The ordinance of a municipal corporation must c form strictly to the statute giving power to pass the or nance in question, or its proceedings will be void. 1 399; Cooley's Con. Lim., p. 191-192, and authorit cited.

"And the general disposition of the courts in this co try has been to confine municipalities within the lin that a strict construction of the grants of power in th charters will assign to them. Cooley's Com. Lin., p. 19 and note 1.

If it was intended by the act of 1879 to confer the le lative power on the council to accept the provisions of s tion 4, such intention must appear from the word "declai as employed in the clause, "declare such acceptance ordinance," in clause 9, section 4.

Applying the rule of strict construction, we must f ascertain the legal sense of "declare." Bouvier defines *"To publish, to make known."* Then when the Legislat

said that the ordinance should "declare," it clearly conferred the power to "publish, to make known," and no other power. But such declaration must necessarily have been predicated upon the prior existence of something, or upon some event which had already transpired at the time of the adoption of the ordinance, otherwise it must apply to some future event, which it clearly does not. It could not have had relation to any transaction pending at the time of the proposed declaration, unless we conclude that the word "declare" was intended as the vehicle for the transmission of legislative power to the council; in other words, that the Legislature of the State, in the solemn form of a statute, invested the City Council with a grant of legislative power of momentous consequence to the city, by *authorizing an ordinance to* "declare." If such had been the intention, would not the statute have omitted "declare" and simply provided that "any city might accept by ordinance the provisions of section 4." Yet it is upon this construction, and this alone, that the City Council has assumed, in behalf of the city, to accept the provisions of section 4.

The necessary conclusion then is, that when the statute said "declare" (to publish, to make known,) it did not empower the City Council to pass the ordinance of March 4, 1879. But until there is an "acceptance," the 4th section cannot become operative. "Any city now containing sixteen hundred or more registered voters, which may elect to accept," &c., says the statute. "Elect" imports the expression of the will of the municipality, and there can be no "acceptance" until such choice or election. If this power is not in the City Council, where does it reside? There is only one other department of the municipality capable of exercising the functions of choice—the registered voters, in the ordinary way, by election. The word "City" necessarily implies the whole body politic, official and unoffi-

cial, and when an election is provided for, in general terms, the qualified voters are always intended. The words which qualify "City," to-wit: "containing sixteen hundred or more registered voters," expressive as they are of numbers, seem to indicate clearly the registered voters as the body to whom the power of choice was delegated. And this view is further emphasized when we consider that every clause of the 4th section must materially affect the citizen in his rights, his property and his privileges.

Then as the ordinance of March 4, 1879, is void, and no choice has been made by the registered voters at an election, there has been no "acceptance" of section 4, and it is not now operative. It follows that the general municipal laws of 1869 and 1871 have not been amended, and the same are still of binding force upon the city of Jacksonville, and constitute its charter. Then the ordinance of September 7, 1878, is still in operation, and respondents, in having neglected and refused to discharge the duties it charges upon them, are liable to the process prayed.

But we maintain further, that if there had been a regular and lawful "acceptance" of section 4 of act 1879, there could be no justification for respondents. The authority of clause 4, of section 4, of act 1879, has been invoked to sustain them in the usurpation of a term of office for themselves and their associates in the city government. The part of that clause which is specially relied on reads: "The term of all Aldermen and municipal officers, provided for in this section, of all cities which shall accept the provisions of this section, now in office, which shall expire before the first day of January next, to-wit: the first day of January, 1880, is hereby extended to that date," &c.

This is an attempt on the part of the Legislature to elect municipal officers for the city of Jacksonville for a term commencing on April 7, 1879, (when the term for which the present incumbents were elected would have expired,)

and ending January 1, 1880. The transparent artifice of phraseology by which the election of officers for a *new term* is sought to be disguised under the pretense of *extending* the *old term* is impotent for any purpose of deception. The respondents were elected for a term which expired April 7th, and it is pretended that their terms of office acquired by a lawful election were extended by the State. This clause is unconstitutional and void.

It will not be denied that although the powers of a State Legislature may be commensurate to those of the British Parliament, they are restrained by the express limitations of the Constitution. Sedgwick on Construction, p. 441, 442; Cooley's Constitutional Limitations, p. 86, 87, 88, 89; People *ex rel.* vs. Bull, 46 N. Y., 57.

The Constitution, article 4, section 27, provides:

"The Legislature shall provide for the election by the people or appointment by the Governor of all State, county or municipal officers not otherwise provided for by the Constitution."

What class of officers is here alluded to by the phrase "not otherwise provided for by this Constitution?" The Governor and Cabinet and all State officers, the Sheriff, County Judge and all county officers are clearly "provided for." Then the clause does not comprehend them. But there is no mention whatever in the Constitution of Mayor, Aldermen, Marshal, etc. Hence they are not "provided for." Then the clause has direct reference to them. It requires that laws be made in respect to them, but limits the Legislature in making such laws by the restriction that all such Mayors, &c., shall be elected by the people or appointed by the Governor, and that the laws shall so provide. If then the Legislature is required to make laws vesting in the people the power of election *or* in the Governor the power of appointment, it is necessarily restrained from electing or appointing thsee officers. This power having

been bestowed by the Constitution elsewhere, the attempt on the part of the Legislature to exercise it is *ultra vires* and void. This being the state of the law when it is made known to the court in a proper judicial proceeding that the respondents have usurped the offices, whose dignities, privileges and emoluments they enjoy, in derogation of the Constitution and disregard of the rights of the people—the remedy prayed will scarcely be denied.

The gravamen of complaint is the utter neglect and refusal of respondents to perform the manifest duties charged upon them by statute and by ordinance to make the necessary arrangements for calling and holding an election on the "charter day," which has elapsed, and that they, availing themselves of their neglect of duty, now continue in possession of their several offices of their own wrong. The remedy is evidently to compel them to the performance of the duties so disregarded and refused to be performed. For this purpose mandamus is the proper process.

The doctrine is thus stated in High on Extraordinary Remedies, section 324: "Mandamus has been fitly termed the spur by which municipal officers are moved to the performance of their duty, and it may be affirmed as a general rule, sanctioned by the best authorities, but when a plain and imperative duty is specified, imposed by law upon the officers of a municipal corporation, so that in its performance they act merely in a ministerial capacity, without being called upon to exercise their own judgment as to whether the duty shall or shall not be performed, mandamus is the only adequate remedy to set them in motion and the writ is freely granted in such cases, the ordinary remedies at law being unavailing."

"And where it is made the duty of a Town or City Council to elect certain municipal officers, and they refuse or neglect to do their duty in that respect, mandamus is the proper remedy." Moses on Mandamus, p. 128; Regina vs

Bradford, 4 Eng. L. & Eq. Rep., 193; 2 Cowan, p. 485; 3 Cowan, 358; People vs. Collins, 7 Johnson, 549.

We concede that by the general rule of the American municipal law, officers hold over beyond the prescribed term of their office until their successors are qualified, but the rule does not apply in the case of default or neglect of such officers to make provision, as required by law, for the election of their successors, nor can they avail themselves of the rule as against the people. The rule is this stated: "As against the public the officers cannot found a *solid title or right to hold over upon their own neglect of duty.* Therefore when the charter made it the express duty of Trustees in office *to give notice of and themselves to hold the annual election,* it was held that if they *omitted to discharge this duty,* though inadvertently, in consequence of which *omission* there was and could be *no election,* that they were not entitled to hold over, although by the charter it was provided that they should continue in office until a new election should be made and their successors qualify." 1 Dillon's Municipal Corporations, secs. 159, 160; People vs. Bartlett, 6 Wend., 222, 422; People vs. Stevens, 5 Hill, 616; People vs. Runkle, 9 Johnson, Rep. 147; Trustees vs. Hill, 7 Cowan, 23; People vs. Bartlett, 6 Wend., 422; Hinton vs. Lindsay, 20 Ga., 746.

The fact that the charter day for election has elapsed, so far from preventing the application of the remedy, is the most imperative reason for the issue of process.

"So in this country it has been held that an election of municipal officers may be held *after the charter day,* and that a mandamus may be granted to compel the proper officers to give notice thereof." 2 Dillon's Municip. Corp., 675; Tap. on Mandamus, p. 165.

Any number of citizens of the municipality may become relators in an application of this nature.

"The writ will be in the name of the State on the rela-

tion of a voter to compel a Municipal Council to hold a special election." 2 Dillon Municip. Cor., sec. 675; State vs. Rahway, 33 N. J. Law, 410; Moses on Mandamus, p. 198.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is a proceeding by mandamus. The relators are registered voters and actual residents of the city of Jacksonville. Without narrating at length all of the allegations contained in the alternative writ, it is sufficient to say that a failure upon the part of the mayor and aldermen of the city to call an election for their successors in office in accordance with an ordinance of the city regulating the subject, is alleged.

It is unquestionably true that if the ordinance claimed to be in force is operative that the respondents have failed to perform their duty in the matter as alleged. They, however allege that the ordinance providing for an election of their successors at the time stated is not in force, having been repealed, as they say, by subsequent legislative action affecting the corporation of the city in such manner that it is in no wise their duty to call such an election.

The city of Jacksonville, it is not denied, was a corporation under and by virtue of the "act to provide for the incorporation of cities and towns, and to establish a uniform system of municipal government in this State," approved February 4, 1869. Nor is it denied, if that act is now in force as to the city of Jacksonville, that the ordinance directing the election to be held was the ordinance controlling that subject, or that it was the duty of the officers of the corporation to call the election, which it is the purpose of the relators here to compel them to call. The defence relied upon principally arises out of the act approved March 4, 1879, being an act to amend the act of February 4,

1869, and the acts amendatory thereof, "and to further provide for the organization and government of cities."

Section 4 of the act of 1879 provided "that all cities organized under the act approved February 4, 1869, which now have or may at any time hereafter have sixteen hundred or more registered voters, may have powers and exercise any or all of the special rights, powers and privileges in this section hereinafter granted, in addition to the general powers and privileges granted under the said act approved February 4, 1869, as aforesaid, and the several acts amendatory thereof, so far as they are consistent herewith." The special rights, privileges and powers granted thereafter in this section were, to some extent, organic in their character, and to some extent, they appertained to such matters as are usually regulated by ordinances of the city under a grant of general powers.

The 9th subdivision of the 4th section of the act of 1879 provided that any city now containing sixteen hundred or more registered voters which may elect to accept the provisions of this section, so far as the same may change in any manner its existing form of municipal organization, and the election of its municipal officers, *shall, before the date of its first annual election as now provided by any ordinance of said city, declare such acceptance by ordinance duly passed according to law, whereupon such change shall take effect on and after its first annual election thereafter to be held on the second Tuesday in December, as hereinbefore provided.* It was threinbefore provided that the regular annual election should be had on the second Tuesday in December.

If the act of 1879 is not in conflict with the Constitution, postponing as it does the annual election until December, then a failure of the mayor and aldermen to call an election until that time is justified by the law. If, on the other hand, the power of the Legislature is so limited as to render this postponement in conflict with the Constitution,

and the ordinance adopted under the legislation of 1869 is in force, then they have violated the law in the failure to call an election; and if the right exists in the relators to compel them to call an election and a mandamus is a remedy appropriate to that end, they can and should be held to the performance of the duty. We first examine the constitutional questions, postponing the consideration of such other questions as we think involved to the determination of this, the most important matter connected with the cause.

The Constitution of this State provides (Art. IV., Sec. 17,) "that the Legislature shall not pass special or local laws in any of the following enumerated cases," * * * "regulating county, township and municipal business; regulating the election of county, township and municipal officers." "In all cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State." (Art. IV., Sec. 18.) "The Legislature shall establish a uniform system of county, township and municipal government." Sec. 21, Art. IV.)

The amendatory act here changes in many very important respects the organic law of cities having, or which may have at any time thereafter, sixteen hundred or more registered voters. These modifications were not to operate, however, unless the city accepted them before the date of its next annual election.

Under the act of 1869 municipal corporations were classified into cities and towns, the city to contain three hundred registered voters, the town less than that number. Their powers were different, not, however, to any great extent, the difference being principally in the matter of authority to issue bonds; the city having such power, while the town did not. Under the act of 1879 a new class, that is cities having sixteen hundred or more registered voters,

was created, and the powers conferred on this class were different from those conferred on the other two. It is thus apparent that the Legislature authorized by its action in these two statutes, first, a municipal corporation known as a city, to contain at least three hundred voters; second, a municipal corporation, known as a town, to contain less than three hundred voters; and third, cities containing sixteen hundred or more registered voters, and that each class had different powers. It is also apparent that the existence of any municipal corporation of the third class depended, first, upon its being *being before that time incorporated as a city;* second, that it contained 1,600 or more registered voters; third, that it accepted the modifications proposed in its organic law by the act of 1879; and fourth, that it declared this acceptance before its first annual election as then fixed by ordinance. As to the first and second classifications, the Legislature has fixed their powers and duties. The power of each municipal subdivision is the same. It is uniform. Each city has the same power. Each town has like authority, and each city and town is controlled in the exercise of its subordinate legislative discretion by like limitations, as well as by like grants of power. Under the act of 1879 each town retains the government it had before, but it is left discretionary with each city having 1,600 registered voters to retain its government under the act of 1869, or to accept the new government provided by the act of 1879, and all cities with a registered vote below 1,600 are held to the government of 1869.

We have stated the limitations and provisions of the Constitution. It cannot be doubted that the act of 1879 is an act "regulating municipal business." (Sec. 16, Art. IV.) Nor can it be doubted that such an act must be a general law of uniform operation throughout the State, (Sec. 18, Art. IV.,) as well as such a law as conforms to the

mandate to the Legislature that it "shall establish a u form system of municipal government." (Sec. 21, A IV.) Is this a general law of uniform operation, and i consistent with a uniform system of municipal gove ment?

We have been unable to find the exact counterpart our Constitution in respect to these matters in the orga law of any other States. The word uniform, however, is very frequent occurrence in constitutional limitations u the power of taxation. A reference to these decision not deemed improper.

The Constitution of Arkansas provided that "laws sl be passed, taxing by a uniform rule all moneys,"&c. Supreme Court of that State says "taxing by a unif rule means by one and the same unvarying standard."

The Constitution of California provided "that taxat shall be equal and uniform." In speaking of the power the Legislature under this clause the Supreme Court of t State says, "it cannot discriminate between persons, grant an indulgence to one which it does not grant to other standing in the same relation." (35 Cal., 616.)

The Constitution of Louisiana provided "that taxat shall be equal and uniform throughout the State." Supreme Court of that State held that it would precl a discrimination as between those carrying on the sa business, but permitted like taxation upon all persons the same trade or calling. These decisions are at least s gestive of a proper definition of the term "uniform" h

There are, however, express decisions covering the d nition of the terms "general law of uniform operation," they occur in our Constitution.

Art. III., Sec. 30, of the Constitution of Iowa, (185 provides that "the General Assembly shall not pass lc or special laws for the incorporation of cities and towr and that "all laws of a general nature shall have a unifo

operation." Under the statutes of Iowa municipal corporations were divided into three classes: Cities of the first and second class and towns. Each class had different powers and privileges. In speaking of the matter of uniformity in the operation of the statutes creating them, the Supreme Court of that State says (20 Iowa, 342): "These laws are general and uniform, not because they operate upon every person in the State, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." It cannot be doubted that the act of 1879 is an act regulating municipal business, (84 Ill., 590,) and that such a law must be general and of uniform operation. The Constitution of Illinois had a similar limitation. Of this limitation the Supreme Court of that State says, (83 Ill., 590; 82 Ill., 473,) "it is not admissible, either by the letter or the spirit of the Constitution, that dissimilarity in character of organization or powers in municipalities of the same class or grade shall be created or perpetuated by enactments of the General Assembly," and that "it is the substance and not the mere form given to the enactment which must determine its constitutionality."

In the case of Smith vs. the Judge of the Twelfth Judicial District, (17 Cal., 554,) the Supreme Court of that State had occasion to construe a like clause in the Constitution. That court held that a general law of uniform operation was such a law as bore equally in its burdens and benefits upon persons standing in the same category.

Our attention has been called to the case of Walker vs. Potter, 18 Ohio, 88. There the court held an act which was applicable to only particular cities of the first class a

general law of uniform operation throughout the Stat The act was clearly a local act, as it was applicable to bu one city of the first class, (31 Ohio, 608,) and if it involve a grant of corporate powers, (which the act of 1879, con sidered in reference to the city of Jacksonville, certainl does here,) it was, according to the subsequent decisions i that State, unconstitutional. (31 Ohio, 608.) But, howeve this may be, the views of the court in that case are no given. The conclusion is simply stated through a *per cu riam*. It is in conflict with the better considered decision in the other States, and we do not doubt the act in questio in that case was not a general law of uniform operatio throughout the State? In view of these authorities, is th act of 1879 a general law of uniform operation throughout the State? Did the act create a class of municipal co porations of sixteen hundred registered voters or mor we do not doubt that it would be a general law of unifor operation, but such is not the case. The local option au thorized makes it a matter of discretion with all citi containing sixteen hundred registered voters or mo to remain in the class of cities containing 300 voters, wit a municipal government prescribed for that class, or to b embraced in the class of cities containing 1600 or mo registered voters under another and different municip government for that class. In the event all the cities wit 1600 or more registered voters should accept this act a the law of their organization, the law might, in fact, hav a uniform operation. That uniform operation, howeve would be the result of chance and not of the operation o a fixed rule prescribed by the Legislature, while the Co stitution contemplates no such contingency. The goverr ment in each class *must be the same*, and such must be th result of the action of the Legislature, independent of th contingency of local discretion or option in the premise The Legislature must itself, independent of acceptance b

such cities, so frame its enactment that (as expressed by the Supreme Court of Illinois,) there shall not be dissimilarity in character of organization or powers in municipalities of the same class. So much, therefore, of the act of 1879 as authorizes a new class of cities, with additional powers in such cities, we think unconstitutional.

In view of this conclusion, based upon a consideration of sections 17 and 18 of Article IV. of the Constitution, it is not absolutely necessary that we should define sections 21 of the same article, but its construction is involved in the case and we think it proper. "The Legislature shall establish a uniform system of municipal government." There is little difficulty in determining the signification of the word "system" in this connection. Its general signification is plan, arrangement, method, and when used in reference to municipal government, it means simply rules and regulations for the organization and government of municipal corporations. Substituting this definition for the word as used in the Constitution, the mandate to the Legislature is that it shall establish uniform rules and regulations for the government of municipal corporations.

It only remains to determine in this connection the signification of the word "uniform." It is unnecessary to repeat here what has been said in regard to its signification when used with reference to the operation of laws throughout the State. The term "system" indicating the plan and method of government embracing the rules and regulations operative in such plan and method, we cannot see that the word "uniform" in this connection has any other or different meaning than we have given to it when considered in reference to the "operation" of a law. In other words, that a system of municipal government in which cities of the same class may have dissimilarity in character of organization as well as different powers, is not a uniform system within the meaning of the Constitution.

Uniformity indicates consistency, resemblance, sameness, conformity to one pattern. The Constitution does not prohi a classification of municipal corporations, but it does requ that all municipal corporations of the same class shall poss the same powers and be subject to the same restrictio In this resemblance, in this sameness, in this conformity each class to one pattern, consists the uniformity of system, and this is essential to constitute a uniform syste This act does not thus necessarily operate, and for this r son and to this extent it is in conflict with organic law. much of it as authorizes an election in December is inop ative, and the rule controlling the matter of election is th prescribed by the ordinance of the city adopted under t act of 1869 and the amendments thereof. The duty of t officers of the corporation was therefore to call an elect for their successors in office.

The remaining grounds upon which a mandamus w resisted, concern the right of the relators as well as t remedy involved. The right of the relators here depen upon the constitutionality of the act of 1879, and for this r son it is insisted that a mandamus will not be granted in t case. Several cases are called to our attention in this co nection, among others the case of Smyth vs. Titcomb, Me., 285. In that case the court held, not that it wou not determine such question when properly presented, i that it did not lie with the respondent, a Collector of Tax to make the objection under the circumstances of that ca and this conclusion was based upon views of public pol in the matter of the collection and disbursement of reven (High Ex. Rem., sec. 143.) The other cases cited we ha been unable to examine. Where action by a minister officer is sought to be compelled, he cannot set up that t acts of *de facto* officers concerning third parties are void want of power in such office. (7 John., 549.) This understand to be the rule in New York. These cases, ho

ever, differ materially from this. Where the question of the constitutionality of an act is presented in a proceeding of the character now before the court, the courts do not hesitate to examine and pass upon the question. (31 Ohio, 592; 29 Maryland, 521; 1 Kansas, 178; 9 Nevada, 217.) We cannot see that there is anything in this objection. Nor is there anything in the position that this proceeding involves a determination of the right of the respondents to their offices. No judgment of ouster is sought. On the contrary, they are treated as *de facto* officers who have failed to perform a ministerial duty. They are treated as officers now discharging the duties of their offices, and mandamus is the proper remedy by which to enforce the performance of their duty when it is ascertained. This, and this alone, is the method by which to compel the respondents to call an election. Nor can we see, as is intimated, that the right of the relators to institute this proceeding is doubtful. The relators here are municipal corporators. The interest is common to all of the corporators. The relief sought is not the protection of a private right or interest. The question is one of public right and duty, the discharge of which is sought to be enforced, is a public duty affecting alike all the people in the city. In such a case the State of Florida is regarded as the real party and the relators need only show that they are corporators and as such interested generally in the execution of the law. 19 Wend., 56; 57 Ill., 307; 1 Cow., 23; 1 Chitty, 700; 2 Strange 1,123; 1 T. R., 146; 48 Ill., 233; 3 Ind., 452; 37 N. Y., 344; 7 Iowa, 186. There are some authorities to the contrary, but the rule as we announce it is the now generally accepted law. High Ex. Rem., sec. 431.

Nor is it any objection that the precise date at which the election was to be held has passed. 4 East, 142; 29 Maryland, 523.

Such a doctrine would practically abolish the remedy by mandamus in such cases. The writ does not lie before but only after default in the performance of a ministeria duty. (Tap. Man., 209, 8 A. and E., 911,) and if it be a good defense to allege that the time fixed for its perform ance has passed, it is evident that the very ground upon which you must base your application for the writ become a sufficient reply to the alternative writ when granted.

Thus disposing of all the questions involved in this con troversy, the result is that the judgment awarding the per emptory writ is affirmed, and the case is remanded with directions to the Circuit Court to issue the peremptory writ.

[The act of 1879 was approved March 4th, instead of March 3d, as stated in the statement of the case and briefs.—REPORTER.]

NORMAN WEBSTER, APPELLANT, VS. WILLIAM B. BARNETT, APPELLEE.

1. A bill of exceptions appearing in the record to have been signed after the expiration of the term at which the trial was had, and an order extending the time therefor having been made during the term, will not be considered.

2. A suit against the maker and indorser of a promissory note cannot be maintained, there being no joint liability, their contracts being several and their liability depending upon different contingencies.

3. In case a judgment is entered in a joint suit against a maker and indorser without their consent, and this appears of record, it is error for which judgment will be reversed.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

C. P. Cooper for Appellant.

1st. "The duty of the holder of negotiable paper is to give notice of any refusal to accept or pay to all antecedent parties. Notice must be given even to one who has knowledge." Parson's Mercantile Law, page 111.

2d. "If the parties live in the same town, notice must be given so that the party to whom it is sent may receive the notice in the course of the day next after in which the party sending has knowledge of its facts." Ib., p. 114.

3d. "If the parties do not live in the same town, reasonable notice is required." Ib., p. 115 and notes; Williams vs. Smith, 2 B. & Ald., 496; Wright vs. Shawcross, 2 B. & Ald., 501; Geil vs. Johnson, M. & Mack., 61; Hawks vs. Salter, 4 Bing., 715; Howard vs. Jones, 1 Hill, 263; Whitenell vs. Johnson, 17 Mass., 449; Parsons on Notes and Bills, Chap. 12, Sec. 6, commencing on page 506, and notes and citations at bottom of page.

4th. "If the letter be properly put into post-office, * * the post-marks are strong evidence that the letter was mailed at the very time these marks indicate," &c. Parsons Mercantile Law, 118; Parsons on Notes and Bills, Chap. 12, p. 485; Crawford vs. Branch Bank, 7 Ala., 205; Stockton vs. Collins, 9 Carr., 653; Abbey vs. Lill, 5 Bing., 299.

5th. "It is well settled that when facts are ascertained, the question of *due diligence* is a question of law." 1 Peters, 583, Bank of Columbia vs. Lawrence.

6th. "Reasonable notice is a compound of law and facts, but when the facts are clearly ascertained it becomes a question of law, and is to be determined by the courts." Whittaker vs. Morrison, 1 Fla. Rep., 25; see also 23 Wendell, dell, 622; 7 Cow., 705; 3 Kent. Com., commencing page 105; 1 Parsons on Notes and Bills, 507-508 and notes, and citations at bottom of page.

7th. "There is *no* presumption of notice, and the plaintiff must prove that it was given and was sufficient." Parsons Merc. Law, 115; Parsons on Notes and Bills, I Vol., p. 516.

8th. "What constitutes waiver of notice by endorser." Whittaker vs. Morrison, 1 Fla. Rep., 25.

9th. "Principal and endorser cannot be sued jointly, either at common law or by statutes of Florida, for the reason that the principal and each endorser makes a new and separate contract and are not jointly bound, and could only be made so by express statute." 3 Kent's Com., 105; Spann vs. Baltzell, 1 Fla. Rep., 301; 1 Chitty's Pleadings, 43.

10th. "If the court is satisfied of its want of jurisdiction, for want of proper parties before it, or if the subject matter is not within its jurisdiction on the case not made by the pleadings, is not fit for the interposition of its authority, it will dismiss the suit of its own motion at any stage of the proceedings." 1 Sumner C. Ct. Rep., 580-581-85; 15 Fla. Rep., 689, Mattair vs. Payne, et al.

Jno. T. Walker for Appellee.

1. There is nothing in the record to show what was the evidence or the rulings, or the instructions of the court below at the trial. The papers copied therein and purporting to be bills of exceptions cannot be so treated, because neither of the said papers was made up and signed according to the Rules. Rules of the Circuit Court, Art. 18.

2. If these papers can be treated as bills of exceptions, it does not clearly appear that they contain all the evidence at the trial. After setting up the testimony of Webster, it is recited, "and the said parties offering no *further* testimony."

3. It does not appear that the appellant *excepted* in the

court below to the rulings of the court. The paper purporting to be a bill of exceptions says "the defendant did then and there *object,*" but *non constat* that he *excepted.*

4. The objection for a misjoinder in the record cannot be raised for the first time in this court.

5. The first appeal mentioned in the record was dismissed out of the court at the last term thereof.

6. The point that the court had no *jurisdiction* of the case *as made,* has not seemed to me, with deference to my learned opponent, worthy of serious consideration.

As to the appearance in the record of two several judgments against the defendant, it is submitted, 1st. that there is no *assignment* of error on that ground; 2d. that if, not being specially asigned, it can or will be considered that it is error, without injury to the appellant Webster; 3d. that it is a mere irregularity, which, if it had been brought to the attention of the court, would have been rectified without inconvenience or expense; 4th, that the judgment upon the verdict vs. Webster could have been amended in the court below, the other defendant, Blew, having made default, and, if necessary, the court will so amend the judgment here or order it to be amended in the court below. Although there are several judgments, there can be but one satisfaction. Wood vs. Bank of Ga., 1 Fla., 381.

THE CHIEF JUSTICE delivered the opinion of the court.

Barnett sued Blew and Webster in assumpsit upon a note for $500, executed by Blew, payable to the order of Webster, and, by him endorsed to Barnett. Due service was had upon both defendants, and default was entered as against Blew for want of appearance and plea. Webster appeared and pleaded only that he did not have due notice of the dishonor or non-payment of the note, upon which issue was joined and the jury rendered a verdict for the plaintiff and

assessed the damages at $523.33. The term closed 29th June, 1878.

At the succeeding term of the court, (December, 1878,) the plaintiff moved the court that judgment be entered *nunc pro tunc*, the clerk having inadvertently neglected to enter the judgment in the minutes at the trial term, and that it be entered as of the date of the verdict June 6th. In answer to this motion the defendant Webster interposed in writing, by way of showing cause why the motion for judgment should not be granted, "that judgment should not be entered up but should be indefinitely delayed on the grounds that the court had no jurisdiction of the case as made, the maker and indorser of a promissory note not being capable of being joined in the same suit under the practice of the courts of Florida, and therefore the verdict in said cause is a nullity; and for other good and sufficient reasons as appear of record."

The motion to enter up judgment was granted by the court, to which action the defendant's (Webster's) attorney excepted, as appears by the attestations of the judge upon the granting of the order for entering judgment *nunc pro tunc*.

The judgment was accordingly entered against the defendant, Norman Webster, only, for the amount of the verdict. No final judgment was entered against the defendant Blew, nor was any attention paid to him as a party to the suit, and no reference is made to him by either party in the proceedings subsequently to the entry of his default, (his name being rarely mentioned even in the entitling of the papers) except in the objections filed to the entry o final judgment *nunc pro tunc* as above stated.

The defendant Webster appeals from the final judgme ... assigns the following grounds for rever

1. That the court erred in his ruling as to the sufficiency of notice of the non-payment and protest of the note.

2. In overruling Webster's motion for a new trial upon the various grounds stated in his motion relating to the proceedings at the trial of the cause.

3. That the court erred in granting plaintiff's motion for judgment, the court having no jurisdiction of the case as made, the maker and indorser of the note not being properly joined as defendants, and that the verdict was therefore a nullity, and for other sufficient reasons appearing of record.

As to the first and second grounds of error, there is nothing in the record which can be considered by this court in deciding the questions raised. The bill of exceptions was made up and signed long after the term had expired at which the verdict had been rendered, without an order allowing time in which to prepare the same. This appears affirmatively by the certificate of the Judge. The body of the record no where contains any of the exceptions upon which the first and second assigned errors are based. We have nothing before us, therefore, by which to determine as to the sufficiency of the proof, or the correctness of the ruling of the Judge upon the motion for a new trial. See Circuit Court rule 97; Thompson's Digest, 351, sec. 2.

The only question remaining is whether the appellant is in a position to take advantage of the misjoiner of the maker and indorser of a promissory note, no demurrer or other pleading having been interposed which raises the question, but the defendant Webster pleaded to the declaration and proceeded to trial upon an independent question. When motion for final judgment against him was made, he does not then raise the question excepting as a question of *jurisdiction*; and this upon the ground that it is not according to the practice to join the maker and indorser in a joint action. This certainly is not a question

of jurisdiction, for the subject matter of the action and the parties were within the jurisdiction of the court, even if the parties defendant may have been improperly joined. But while the appellant has thus erred in placing his opposition to the entry of judgment upon the supposed defect of jurisdiction, it is still apparent that the objection was made that there was a misjoinder of parties defendant; that a debtor and a surety, whose promise or contracts are several, the one absolute and the other contingent, are wrongfully sued as joint contractors or upon a supposed joint liability.

In a case of this kind, "if too many persons are joined as defendants in an action on a contract or specialty, if the objection do not appear on the pleadings, the plaintiff may be nonsuited; or if the objection appear on the pleadings, defendant may demur, move in arrest of judgment or bring error." 2 Saunders Pl. and Ev., 15; 1 Chitty Pl., 50; Tidd. Pr., 630; Chandler vs. Parker, 3 Esp. N. P., 76; Coryten vs. Litheby, 2 Saund. Rep., 117, note.

It is a well settled rule, that in an action *ex-contractu* against several defendants, the plaintiff must show a joint liability in all. (Erwin vs. Devine, 2 T. B. Munroe, 425; Peters C. C. R., 27; Brown vs. Warner, 2 J. J. Mar., 37; Kimmel vs. Shultz, Breese, (Ill.,) 169; Livingston vs. Tremper, 11 John., 101.) This is the general rule in the American States, except that in some of them, if one of several joint defendants show infancy, coverture and the like, judgment may be had against the others.

It will be observed that in the present case, while the action is joint against Blew and Webster, no judgment was had against Blew, (no proceeding subsequent to the default having been had against him,) but final judgment is entered against Webster alone. This is clearly an error. Judgment should be had against both or neither of them, no disability to be sued appearing as to Blew.

But it is said on the part of the plaintiff that there being no bill of exceptions, and the objection of misjoinder of defendants not having been raised in the court below, it is too late to raise the question here. The defendant's counsel, however, did interpose the objection that no judgment should be entered as the action was joint while the cause of action was distinct and several as to either of them and the action could not be maintained. The fact that it was erroneously urged as a jurisdictional question does not alter the fact that the material objection was urged that a joint action could not be maintained. The error appears upon the face of the declaration, that no joint liability is shown against these defendants, and by all the authorities there can be no recovery against either or both of these defendants in a joint action.

The error being apparent in the record, and insurmountable without an amendment of the pleadings under the 8th section of the "act to amend the pleadings and practice in the courts of this State," approved February 8, 1861, (Ch. 1096,) it was not necessary to incorporate it in a bill of exceptions. The matter is before us, and the law cannot tolerate a judgment against one of two joint debtors, both being sued by a joint action; nor will the law tolerate a suit or judgment against two while the declaration does not disclose a joint liability, but shows that there was actually no joint liability. And we have seen that when such an objection "appears in the pleadings, the defendant may demur, move in arrest or take advantage of it by a writ of error."

The judgment is reversed.

BENJAMIN F. HILL ET UX., APPELLANTS, VS. L. P. WESTCOTT, APPELLEE.

An appeal will be dismissed where there is from term to term a continued and persistent failure to file a petition of appeal.

Appeal from the Circuit Court for Orange county.

The appellee moved to dismiss the appeal taken by appellants from a decree in chancery.

The transcript of the record was filed in this court at the January Term, A. D. 1879.

The other facts are stated in the opinion of the court.

St. Clair Abrams and Summerlin for the Motion.

Bolling Baker, contra.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The motion to dismiss the appeal in this case is upon the ground that no petition of appeal has been filed within three days after the return of the writ or filing the transcript of the record. Rule 8 of Practice.

This case was submitted by one of the parties at the last term. It being discovered that no petition of appeal had been filed, the clerk of this court was directed to inform the appellants of this fact.

Now, at the hearing of this motion at this term, (the counsel of record on this appeal being present,) there is no even an application made to file a petition. The court should not, as a matter of course, allow further time to file such petition under these circumstances, when such act is not even requested.

Motion granted.

ELIAS BAUKNIGHT, ET AL., APPELLANTS, VS. A. M. SLOAN & CO., ET ALS., APPELLEES.

1. No particular form of words is required by the statute or rules in taking an appeal from a decree in chancery. It is sufficient if the entry or notice of appeal shows that an appeal was intended.

2. Where, upon a stipulation being filed that the Judge should transfer a cause pending in the Circuit Court of one of the counties in his circuit to another particular circuit, designating it, and that the cause be heard and decided by the Judge of the latter circuit, an order is made by the Judge of the former circuit that the cause be referred to the Judge of the latter circuit, but the order is silent as to changing the venue or transferring the cause to any county in such circuit: *Held*, That no change of venue was effected, but the venue and record remained in the former court, and that upon a trial thereof and rendition of a final decree by the latter Judge and the transmissal of the papers to the clerk of the former court and the entry of the decree by him, the decree is the decree of that court, and an appeal should properly be taken from it as the decree of such court.

3. A Bond is not required in an appeal in chancery except to make the appeal operate as a supersedeas.

Appeal from the Circuit Court for Alachua county.

The appellees move to dismiss the appeal, which was taken from a final decree in chancery, on the grounds stated in the opinion.

B. H. Thrasher and R. F. Taylor for Motion.

Thos. F. King, contra.

THE CHIEF JUSTICE delivered the opinion of the court.

Appellees move to dismiss this case upon the grounds, 1. That no appeal has been entered, nor any application for an appeal placed on file in the office of the clerk of Alachua county.

2. Because the cause, originally pending in the county of Alachua, 5th Circuit, was removed to Orange county in the 7th Circuit and the decree rendered by the Judge of that circuit in Orange county, the Judge of the 5th Circuit having been of counsel in the cause, and the appeal should have been taken from the decree of the court in Orange county instead of Alachua.

3. Because no bond was given by the appellants on appeal as required by law.

I. Upon examination of the record no formal entry of appeal appears to have been made except by notice served on the Clerk of the Court and filed, and a similar notice was served on the counsel for appellees, to the effect that "an appeal has been taken from this decree." This notice to the Clerk was evidently intended as an entry of appeal and was so considered by the appellants and by the clerk, and was followed by the filing of a transcript of the proceedings in this court, the citation on appeal beng expressly waived by the appellees.

No particular form of words is required by the statute or by rules in taking an appeal from a decree. The grammatical construction of the notice or entry of appeal is not material if it shows that it was intended to be an appeal. That it was so intended is admitted by the appellees, by the express waiver of the citation after notice of appeal. The record is here, properly attested, containing this notice and this admission, and we must treat these as constituting an appeal duly entered.

II. As to the venue. The suit was commenced in Alachua in the Fifth Circuit, the present Judge having been one of the solicitors for the complainants before his appointment as Judge. The cause being at issue, the respective counsel entered into a written stipulation that the Judge transfer the cause to the Seventh Circuit, and that the cause be heard and decided by the Judge of the Seventh

Circuit. Upon the filing of this stipulation the Judge of the Fifth Circuit made an order that the cause be referred to the Judge of the Seventh Circuit, but made no order changing the venue or transferring the cause to any county in that circuit. The venue therefore and the record remained in the Alachua court.

The parties then appeared before the Judge of the Seventh Circuit, testimony was taken and the pleadings and evidence submitted to the Judge of the Seventh, and he made a decree therein and forwarded all the papers with his decree to the Clerk of Alachua, where the decree was entered. In all but two or three of the papers filed by counsel on both sides, the cause is entitled as of the Circuit Court for Alachua county. The stipulation of the counsel in its terms may be treated as an agreement that the venue may be changed, or that the cause be referred to and heard before another Judge without such change. They proceeded in the cause to trial and decree without the transfer of the record to any other court. The statute provides the manner of transferring the cause to "some court in the next nearest circuit," but the act was not complied with so as to effect a change of venue. See Chap. 373, Laws of 1851, p. 124, secs. 1, 3.

The fourth section of this act provides further that whenever the Judge shall be disqualified from interest or other cause to act, it shall be the duty of any other Circuit Judge, on the application of parties, "to hear and determine all such matters as may be submitted to him; and such Judge may discharge said duties either in his own or any other circuit, and shall be substituted in all respects in the place and stead, in the matters aforesaid, of the Judge unable or disqualified to act."

To all intents this section substitutes the Judge of another circuit, in the particular cause, for the Judge of the circuit where the suit is pending, and the former becomes a

referee of the cause, especially, as in the present case, where the parties have entered into a stipulation like that found in this record. The decree in this suit is the decree of the Circuit Court for the county of Alachua, and the appeal was properly taken as from the decree of that court.

III. As to the bond on appeal in equity cases, it has been held that the statute did not require it except for the purpose of staying proceedings. That question was properly settled in Kilbee vs. Myrick, 12 Fla. 416.

The motion to dismiss is denied.

ELIAS BAUKNIGHT, ET AL., APPELLANTS, VS. A. M. SLOAN & CO., ET ALS., APPELLEES.

1. When at the hearing it appears that there is a joinder of equitable and legal causes of action against different defendants, also different claims against the same defendant by different plaintiffs, as well as different and distinct demands by different plaintiffs against different defendants united in the same bill, and there is no common interest centering in the point in issue in the cause, the court should *sua sponte* dismiss the bill at the cost of the plaintiffs.

2. Where the object of a suit is single and there is one general point in issue rendering the interest common to defendants, such as a suit to subject the property of an alleged fraudulent grantor, held in different parcels by different grantees, to the claims of his creditors, the objection of multifariousness will not prevail.

Appeal from the Circuit Court for Alachua county.

There was a final decree subjecting certain lands held by Dora E. Smith and others, grantees, to the payment of the judgment of A. M. Sloan & Co., and from this decree the appeal is taken.

The other facts of the case are sufficiently stated in the opinion for an understanding of the points decided.

Thos. F. King for Appellants.

B. H. Thrasher & R. F. Taylor for Appellees.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

Complainants in the court below are A. M. Sloan & Co., judgment creditors, of Elias Bauknight and John son, Crews & Co., creditors, without a judgment, of the firm of E. Bauknight & Son, such firm consisting of Elias Bauknight and his son, William E. Bauknight. Such partnership has been dissolved by the death of William E. Bauknight, the Sheriff, Louis A. Barnes, being his administrator and legal representative.

Complainants assail E. Bauknight as a fraudulent grantor. With him, as defendants, they join his alleged fraudulent grantees, among whom William E. Bauknight is alleged to be. These grantees claim distinct and several parcels of property under distinct and several deeds. No partnership assets are alleged to exist. The prayer of the bill is for a sale of the property and payment of the debts.

This was the case as presented to the chancellor upon the hearing, and it must be treated in this respect here.

It is objected that the bill is multifarious, and that it should have been dismissed at the hearing. The general rule is that a defendant must object to the bill upon this ground by demurrer, and that such an objection will not be admitted at the hearing. (5 Madd., 122; 1 Russ., 293 ; 2 Sch. & Lef., 370-371 ; 4 Hare, 32.) A defendant, confident of his case, may not thus object, and yet a bill may be so eminently and extremely multifarious that the court will, *sua sponte,* take notice of such defect, and dispose of

the case upon this ground. Courts of equity should so act as to preserve at least some analogy to the simple pleadings of the common law in their proceedings, and where the case as stated must lead to confusion in pleadings and decrees, to unnecessary costs, to a confounding of proofs, and to unusual delays, the chancellor should not hesitate to dismiss the bill, saving the rights of all parties to the extent that justice requires. Story Eq. Pldg., 271; 1 Mylne & K., 559; 15 Fla., 682.

The first objection which here suggests itself is that several grantees, claiming different portions of the property of a fraudulent grantor, are made defendants with the fraudulent grantor. A bill for this reason is not multifarious. As against the creditor the deeds for this property, whether there be one or many, or whether there be one grantee or many, are void. The entire property is treated in a court of equity as the property of the debtor. The object sought to be attained is single, the subjection of the debtor's property to the payment of his debt. The leading case upon this question in the United States is the case of Fellows vs. Fellows, 4 Cowen, 682; see also 3 McLean, 420; 4 John. Chy., 671; 5 Paige, 651; 23 Wis., 491; 45 N. H., 511; 11 Ala., 437; 30 Miss., 472; 9 Minn., 183; 16 N. J. Eq., 213-313; 42 Mrld., 426; Story's Eq. Pldg., §§285, 286.

This, however, is not the only objection to the construction of this suit. The plaintiffs are each creditors of E. Bauknight. One is his general creditor, the other is his creditor as surviving partner of the partnership of Bauknight & Son. One of the plaintiffs, Sloan & Co., is no creditor of the defendant, William E. Bauknight. They (S. & Co.) attack him and real estate claimed by him as a fraudulent grantee of E. Bauknight. The other plaintiff, Johnson, Crews & Co., sue the administrator of the deceased partner, W. E. Bauknight, and the surviving partner, E.

Bauknight. The relief prayed is a sale of the property, and payment of the debts of each plaintiff.

There being no partnership assets, the remedy of Johnson, Crews & Co., as against the surviving partner, is an action at law, and as against the deceased partner, is a bill in equity for an account and decree for the sum to be found due. 3 Fla., 72; Story on Partnership, §§361, 362; Bump on Fraudulent Conveyances, 528, and cases there cited.

The defendants are different and distinct, and the claims of the plaintiffs as against the defendants are different and distinct. One is a separate creditor of E. Bauknight, the other is a joint creditor of E. Bauknight as surviving partner, and no joint effects being alleged to exist, his exclusive remedy is, as stated, an action at law against him. There is no equitable cognizance of this claim. (Story on Part., 361, 362.) It is thus apparent as to defendant E. Bauknight that not only are distinct and separate claims set up in the bill, but that there is a joinder of legal and equitable causes of action, such causes of action being also entirely different and distinct claims by different and distinct plaintiffs.

The claims of the plaintiffs as against William E. Bauknight, or rather as against his legal representative, his administrator, are not only distinct and different, but are in conflict.

Sloan & Co., as judgment creditors of E. Bauknight, assail the property in the hands of the legal representative of William E. Bauknight as the property of E. Bauknight, subject to their claim. They allege that William E. Bauknight was the fraudulent grantee of E. Bauknight.

Johnson, Crews & Co., as a creditor having no judgment, assail the property as the property of William E. Bauknight, deceased partner of the firm of Bauknight & Son. The conflict is manifest. As against the legal representative of the deceased partner, the partnership creditor has

an equity for an account and decree. (3 Fla., 72.) In this view the effect of the order dismissing the bill generally as to Johnson, Crews & Co. may be a question of some importance to them. In this bill a separate creditor of a surviving partner sues the administrator of the deceased partner and the surviving partner and his alleged fraudulent grantees, a joint creditor of the surviving partner sues the surviving partner, his fraudulent grantees, and the legal representative of the deceased partner.

Such a case being presented at the hearing, the chancellor should have dismissed the bill without prejudice to the rights of the parties.

We have here a joinder of equitable and legal causes of action supplemented by different claims against the same defendant by different plaintiffs, and also different and distinct demands by different plaintiffs against different defendants, there being no common interest centering in the point in issue in the cause. There is here a misjoinder of causes of action, misjoinder of parties, and a union of distinct demands, of which the court should have taken notice at the hearing.

The decree is reversed, with directions to remand the case for a disposition in conformity to the views expressed in the opinion herein rendered; the costs in this court and in the Circuit Court to be taxed against the plaintiffs in equal proportions.

LAFAYETTE WOOTEN, APPELLANT, VS. WILLIAM BELLINGER, APPELLEE.

1. Affirmative relief cannot be decreed in favor of a defendant, (except in matters of account,) upon the facts stated in the answer. And when it appears that the bill cannot prevail against a defendant on account of his superior right, it is the duty of the court to dismiss the bill as to him, unless he shall file a cross-bill setting forth his rights with a proper prayer for relief as against all other parties.

2. A vendor of land has not by virtue of his lien for unpaid purchase-money a lien upon the rents and profits. The equitable right of a mortgagee to charge upon the rents and profits depends upon the peculiar circumstances of the case. Such equitable charge is subordinate to any lawful lien upon the products existing at the time they are sought to be charged.

Appeal from the Circuit Court for Jefferson county.

The facts of the case are stated in the opinion of the court.

Pasco & Palmer for Appellant.

It is well settled that no affirmative relief can be afforded to a defendant upon an answer. If he desires such relief it can generally be obtained upon an original or cross-bill. Sand's Suit in Eq., Secs. 451-454; Story's Eq. Pl., Sec. 398, (a); McConnell vs. Smith, 23 Ill., 611; Armstrong vs. Pierson, 5 Clark, (Iowa,) 317; Mitford's Eq. Pl., 65.

In this cause the defendant Bellinger can have no basis for a decree against the cotton until he has established a claim against Davis. Davis, so far as the pleadings are concerned, may owe him nothing. He can make no charge against his co-defendant that can be answered by Davis, no issues can be joined or tried, and where the whole case rests upon a question of indebtedness between two defendants,

the rights of third parties ought not to be determined adversely until proper issues have been joined and tried. In this cause the court has decreed the payment of money to Bellinger out of the proceeds of a quantity of cotton in its control raised by Davis, and upon which Wooten is decreed to have a lien before Bellinger has reduced his claim to a judgment. As Bellinger's claim stands it is simply an open account, and if anything is due thereon the amount is still unliquidated, either by an agreement between the parties, the report of a master, or by a finding of the court.

But if the court can look beyond this matter of practice, we can proceed to the questions which must ultimately be settled before this litigation can be terminated.

The contract of purchase went into effect January 1, 1877, when Davis went into possession, and the court has already decreed that Wooten should have relief under his mortgage, not only against the land but also against the crops raised thereon, under the rule laid down in the case of Pasco vs. Gamble, already cited.

The other defendant has no claim against the land itself, but sets up a prior or superior lien upon the crops, and the court is called upon to settle the relative rights and equities of Wooten and the defendant Bellinger.

Wooten is the acutal owner of the land in equity, and the cotton, until its severance, was his as *pars soli*. 2 Story's Eq. Jur., §1220.

Viewing him as a mortgagee, his mortgage covered the land and its products. Pasco vs. Gamble, 15 Fla., 562-568.

As an equitable mortgagee his claim is entitled to the very highest consideration, for the indebtedness represented the purchase-money. 2 Story's Eq. Jur., §1299; 1 Hilliard on M'tges, 66; Willard on Real Est., 114; Warren vs. Fenn, 28 Barb., 333-334.

Davis was allowed to go into possession of the land to

enable him to meet his first payment to Wooten. It was his first duty in connection with the land, and until the discharge of the duty he had no right or interest in the property that he could sell or pledge to a third party, and he could only make the sale or pledge subject to Wooten's prior rights and property in the premises.

An examination of the mortgage given by Davis to Bellinger shows that he only attempted to mortgage his interest in the crops, and not the crops themselves.

Bellinger's claim to priority seems to be based upon one or all of the following grounds:

1st. That Wooten had no written and recorded lien upon the crops themselves.

2d. That Bellinger is prior in time.

3d. That he has a preference under the statute on account of the nature of his debt.

Wooten's mortgage is equitable and needs no record. It depends upon the fact that he sold the land and retained the title as a security. No money was paid by Davis and no notes were given. Bellinger virtually admits notice in his answer and testimony before making advances. Bradford vs. Marvin, 2 Fla., 463; Woods vs. Bailey, 3 Fla., 41; State of Florida vs. Anderson, 1 Otto, 676; Perry on Trusts, §231, et seq.

This equitable mortgage dates back to the time of the contract of sale in January, 1877. Bellinger did not take the instrument he attempts to claim under till the following May, and did not attempt to record it till September 28, so that Wooten is prior in time, and therefore stronger in law unless other equities intervene. Unless, then, Bellinger has a higher equity because of the nature of Davis' debt to him, Wooten's claim must be preferred.

Let us examine the nature of Bellinger's claim:

1st. The consideration is ten dollars in hand paid to Davis.

2d. Davis mortgages "all of his right, title, interest, claim and demand in his entire crop of cotton" on the Mill place.

3d. It is to secure the payment of all lawful claims held against Davis by Bellinger, whether as advances or otherwise.

4. Bellinger does not promise any further advances.

5. So far as anything appears in the instrument it is for a pre-existing debt.

6. Bellinger has other security for a portion of his debt. Bellinger does not set up the statute as a defense, nor can he do so, the statute (Laws of Fla., Chapter 1739,) requires, before the creation of the lien, (1) "an instrument of writing consenting to said lien, (2) the recording of the same in the records of the Circuit Court of the county where given." This instrument does not afford any internal evidence that it is such a lien as the statute contemplated; $113.91 of the account bears date before the instrument was signed, May 5th, 1877, and $508.38 before it was recorded, September 28, 1877. The latter date is the date of completion of the lien, and only $101.24 of the account was made after that date and the payment made by Davis of $326.34 is of a larger amount. Davis has also paid from the toll corn derived from Wooten's mill a considerable sum to Bellinger which should have been placed upon this account, and not upon Bellinger's medical account of a previous year, nor upon the indebtedness for the mule upon which Bellinger had a particular lien or mortgage for money advanced to pay for it. The statute provides for a lien upon the products grown through the assistance of the loan or advance and there is no proof here nor even an allegation in Bellinger's answer that the cotton in litigation was so grown. But it is in evidence that Davis had an income all through the year from the toll corn from the mill on the place to the extent of

over six hundred bushels a year, surely enough to furnish a seven mule farm with meat.

If Bellinger claims under a statutory lien, he must show that he has in all respects complied with the statute. Sanders vs. Pepoon, 4 Fla., 465; Weed vs. Stanley, 12 Fla., 166.

In conclusion the appellant submits the following propositions as pertinent to this issue and deems them supported and established by the authorities cited. Bellinger's mortgage was in part at least given to secure an antecedent indebtedness and to that extent he was affected by equities of Wooten even without notice of them. Perry on Trusts, sec. 239; Story on Sales, sec. 313; Wells vs. Morrow, 38 Ala., 325; Donald vs. Hewett, 33 Ala., 549; Gafford vs. Steans, 51 Ala., 434-443; Hallock vs. Smith, 3 Barb., 267.

Bellinger took his mortgage with full notice of Wooten's equities, and therefore took subject to them. Jones vs. Zapham, 15 Kan., 540.

The course marked out by the statute must be complied with and completed before the lien is created. Bain vs. Brooks, 46 Miss., 537; Stewart vs. Hollins, 47 Miss., 708; Curston vs. Gilmore, 3 (Richardson,) S. C., 46; Kelly vs. B'k of State of S. C., McMullan, 431; Dawson vs. Higgins, 50 Ala., 49; Bottomly vs. Grace Church, 2 Cal., 90; McLester vs. Somerville, 54 Ala. 670; Boswell vs. Carlisle, 55 Ala., 554-567.

T. L. Clarke for Appellee.

Complainant had only a vendor's lien or equitable mortgage on the land. The cotton crop was gathered and removed from the premises before the bill was filed. The lien, if it ever existed, was lost when the crop was severed from the realty and removed. Though somewhat informal,

Bellinger's mortgage has all the essentials of a mortgage on personal property, and a statutory lien. It is certainly "an instrument of writing, signed by Davis consenting to a lien upon the crops for the supplies furnished, and was duly recorded in the records of the Circuit Court, of the county where given." The act of February 16, 1870, gives to the party making advances a statutory lien of prior dignity to all other incumbrances saving and excepting a lien for labor upon all the products grown, &c. Whether viewed as a chattel mortgage or statutory lien, this paper certainly gave the appellee such a lien on the cotton crop as would attach to and follow it after it was removed from the premises.

A subsequent purchaser or incumbrancer for value without notice of a vendor's lien is not affected by it. The testimony shows that appellant knew that appellee was making advances to Davis, and yet gave him no notice of any lien or intention to claim a lien on the crop till late in the fall when the crop was about finished; that appellee searched the records of the county before agreeing to furnish the supplies and found no lien recorded.

It further appears that Davis was unable to make the crop without the supplies furnished him by appellee; that Davis' means and ability were known to appellant before he contracted to sell the land to Davis; that through the instrumentality of the supplies furnished by appellee Davis was enabled to make the crop and pay off the laborers employed by him, and thereby secured the entire cotton crop, as well his share as that of the laborers who made it, and even without any express lien. Appellee had an equity in this cotton crop removed from the premises superior to any equity or lien of appellant. There was no error in the court's ruling that appellee's lien was superior in dignity to any lien or equity of appellant on the cotton in question.

The 1st, 2d, and 3d errors complained of may be con-

sidered together, they being simply to the effect "that the court erred in finding a definite amount due to appellee and giving him affirmative relief."

The court having all the parties before it could pass upon the rights of each in the property in question and do complete justice. (Story's Eq. Jur., Vol. Vol. 1, sec. 457; Ib., sec. 65; Ib., sec. 71; Fonb. Eq. b. 6, Ch. 3, sec. 6.) Appellee was brought into court by appellant. In his answer to appellant's bill he shows his lien, gives an itemized statement of his account for supplies furnished, showing the balance still due him and prays that the cotton which was then in the custody of the court might be sold and the balance due him paid out of the proceedings of such sale. The balance due him was not controverted or denied, but fully proven by the testimony. It was nowhere denied that the balance of the proceeds of the cotton after payment of appellee's claim for supplies should in equity go to the appellant on his claim. Now, after the court was satisfied of the superiority of appellee's lien, what other decree could be rendered? How could the balance be ascertained but by finding the amount due to appellee and decreeing a sale of the cotton and the payment of appellee' claim first out of the proceeds? (Story's Eq., Jur., Vol. 1, sec. 457.) This settled the rights of all parties and prevents a multiplicity of suits. There is no error in the decree appealed from.

THE CHIEF JUSTICE delivered the opinion of the court.

The appellant, complainant, brought his bill as against defendant Davis, to foreclose a "lien" for unpaid purchase money of certain land sold by him to Davis, and also to hold a crop of cotton raised on the land as subject to the same "lien" or charge, upon which cotton the defendant, Bellinger, holds a mortgage duly recorded to secure ad-

vances and supplies furnished by him to Davis to enable him to make the crop.

Complainant was the owner of an equitable estate in the land and contracted to sell to Davis a legal title for three thousand dollars in three equal annual payments, dating from January 1, 1877, under which contract, (not reduced to writing until late in that year,) Davis went into possession, made repairs and improvements and raised a crop of cotton. He failed to make the first payment when due, and was proceeding to pay Bellinger from the avails of the cotton the money secured by the mortgage thereon when complainant filed his bill and had a receiver appointed to take charge of the cotton and hold it until final order.

The bill charges that Bellinger took his mortgage from Davis to secure advances, supplies and general indebtedness, "with full knowledge of complainant's lien for purchase money."

Bellinger's answer denies any notice or knowledge of any such lien, but says that in February, 1877, he was informed by Davis that there was no lien or incumbrance on the crops to be raised on the premises, and Davis proposed to give him a lien upon the crop to secure payment for advances and family and plantation supplies to be made by him during the year to enable Davis to carry on the place and make a crop, and Bellinger agreeing thereto commenced to make such advances and furnish supplies and continued to do so during the year. In May, Davis executed to him a mortgage upon the crop, which mortgage was duly recorded in September sometime before the contract between complainant and Davis was reduced to writing, and was conditioned to secure Bellinger for advances and plantation supplies and any other indebtedness that might be due him from Davis. That complainant knew in the meantime that he, Bellinger, was furnishing Davis with the means of carrying on the place and of making and

gathering the crop, and yet never intimated that he had or claimed any lien or incumbrance upon it. Bellinger sets out his account in detail against Davis for supplies, &c., and claims that there is due him over three hundred dollars which he claims is a superior lien by virtue of his mortgage and prays that the cotton be sold and he be paid, and for general relief, and that he be dismissed, &c.

The prayer of complainant's bill is that his equitable lien upon the land for unpaid purchase money be enforced; that Davis be foreclosed of his equity of redemption therein; that the land not being of sufficient value to pay the amount of purchase money, interest and taxes due and to become due, and Davis being alleged to be insolvent, complainant will not be able to realize enough by a sale of the land, therefore prays that the crops and products of the land, and particularly the cotton, be subjected to its payment. A receiver and an injunction were also prayed to prevent the application of the cotton or its proceeds to the satisfaction of Bellinger's mortgage.

Testimony was taken and on Oct. 5, 1878, the court decreed that Davis pay the first installment of $1000 and interest from January 1, 1877, on or before October 15, 1878; that Davis and others claiming under him be foreclosed of all equity of redemption in the "mortgaged premises," and in case of default in such payment the land be sold and the proceeds applied to the payment of the "indebtedness;" that the master take into his charge all the crops of every description raised on the land and hold the same subject to the order of the court; that the cotton raised on the place during 1877 be taken charge of by the receiver and sold, and out of the proceeds pay the defendant Bellinger the balanece of his claim against Davis amounting to $324.78, and if a balance of the proceeds remains, it be paid over to complainant upon his claim.

From this decree complainant appeals and seeks a re-

ersal thereof so far as it decrees that Bellinger has a lien upon the cotton, by virtue of his mortgage, for supplies and advances to Davis, superior to complainant's lien thereon on account of the unpaid purchase money for the land sold; that no judgment should have been given in favor of Bellinger upon his answer except a dismissal as to him; and that the decree should have been in favor of complainant and against Bellinger as to the crop of cotton.

Two questions are presented here:

First, Whether this decree in favor of one of the defendants against his co-defendant and against the complainant, upon a simple answer (setting up a mortgage lien upon the cotton in controversy, which he claims is superior to the lien of the complainant for purchase money,) can be sustained; and, *second,* whether the complainant is entitled, upon the whole case, to a decree against the defendant Bellinger, deferring the lien of the mortgage of the latter to the lien claimed by complainant upon the crops, growing out of his lien upon the land for the purchase money.

I. As to the first of these propositions, it seems to be the settled practice that affirmative relief must be sought by a defendant either by a cross bill or by an independent suit, and can never (except in case of bills for an account when both parties are deemed actors,) be granted upon the facts stated in the answer. Story's Eq. Pl. 8th Ed., section 398, a, 522; McConnel vs. Smith, 23 Ill., 611; Armstrong vs. Pierson, 5 Clarke (Iowa,) 317; Wiseman vs. Smith, 6 Jones Eq., 124; Adams Eq. 6 Am. Ed., 402-403 and notes.

This rule is founded upon sound principles, for a defendant or each of several defendants is called upon by the complainant to answer the allegations of the bill only, and if, under the guise of an answer, he may set up not only matters of defense to the bill, but also affirmative demands relief as against the complainant, and, in addition, affirmative claims against other defendants which they have

means or opportunity to defend against under the issues possible to be made upon the bill, it would often result in the confiscation of rights and property without due process of law and involve parties and suits in confusion. The affirmative relief given by the decree in this case could not possibly have been granted under any issue upon the facts stated in the bill. The priority of liens may well have been involved, but the extent of the claim of the defendant Bellinger as against his co-defendant was not pertinent to any legitimate issue in the case under the complainant's bill.

In Mitford's Eq. Pl., 6th A. Ed., 100, it is said: "Upon hearing a cause it sometimes appears that the suit already instituted is insufficient to bring before the court all matters necessary to enable it to decide upon the rights of all the parties. This most commonly happens where persons in opposite interests are co-defendants, so that the court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject matter of the suit. In such a case, if upon hearing the cause the difficulty appears, and a cross bill has not been exhibited to remove the difficulty, the court will direct a bill to be filed, in order to bring all the rights of all the parties fully and properly for its decision, and will reserve the directions or declarations which it may be necessary to give or make touching the matters not fully in litigation by the former bill, until this new bill is brought to a hearing." 3 Ch. Rep., 19.

If herefore it was found by the court that, upon the pleadings and proofs in the case, the complainant was entitled to relief as against the defendant Davis, and that Bellinger had a lien superior to that of the complainant, so that the latter was not entitled to a decree as against the rights of Bellinger, the court should have dismissed the

bill as to Bellinger unless within a proper time he filed his cross bill with a prayer of such relief as he might be entitled to, and to the end that his claims might be fully ascertained and enforced as against all other parties.

II. Has the complainant such an equitable lien or "charge" upon the crops by virtue of his equitable right to charge the land for the purchase money due upon the land as to give him a preference over a subsequent *bona fide* mortgage creditor with or without notice of the lien upon the land?

The rule of the civil law that a vendor of land has an equitable "lien" or a right which he may erect into a lien for the unpaid purchase money, has been recognised by the court of chancery in England from a very early day. It has been adopted also in a large majority of the States, though in some of them with considerable qualifications; and in some of them it is repudiated, generally on the ground that it is founded in a secret trust, not entitled to favor in equity and contrary to the policy of the registration acts.

The "vendor's lien" for purchase money has, however, been expressly recognized in this State in Bradford vs. Marvin, (2 Fla., 463,) and in Woods vs. Bailey, (3 Fla., 41.) In the present case, however, the complainant does not rely solely upon the vendor's lien as an equitable charge, because he has not conveyed the title to defendant Davis. Indeed neither party has the legal title, the complainant having only an equitable estate which he asserts could be readily converted into a legal title. The absence of a legal title, however, is not an objection to the enforcement of the remedy sought by this bill. In one of the early leading cases, Mackreth vs. Symmons, 15 Vesey, 329, Lord Eldon sustained a bill where neither party had the legal estate. Here is an unexecuted contract of sale and the vendor may file a bill for a specific performance and then have the land sold

for the satisfaction of the purchase money. (Clark vs. Hall, 7 Paige, 382; Brush *et al.* vs. Kinsley, 14 Ohio, 20.) This is the purpose of the present bill so far as the land is concerned.

The vendor's lien is regarded by some of the courts as in the nature of an equitable mortgage, inherent in the contract of sale and qualifying the ownership of the vendee, (2 Rob. Va., 404,) and by others it has been treated as a trust, incident, uniformly and necessarily, in equity, to all conveyances where the purchase-money is not paid. (3 Maryland Ch., 488; 1 Bland, 491-525.) In many States it is denied that this lien is either an equitable mortgage or a trust, and the editor of leading cases in equity in notes to Mackreth vs. Symmons, remarks that it seems to be an original and natural equity that the creditor whose debt was the consideration of the land should, by virtue of that consideration, be allowed to charge upon the land upon failure of the personal assets. It is not regarded as a lien until a bill has been filed to assert it, when it becomes a specific lien, but this equity, though prevailing against the vendee and all claiming through him, is subordinate to the rights of subsequent lien creditors with or without notice. (L. C. in Eq., 4 Am. Ed., 500-502.) This doctrine is sustained by Mr. Justice Story in Gilman vs. Brown, 1 Mason, 192.

The rule in this State, however, has been announced to this effect, that a vendor has a lien for unpaid purchase-money of real estate, (somewhat like unto that of an unrecorded mortgage,) "subject to be defeated by the intervention of creditors or purchasers without notice," or is waived by taking other security. (2 Fla., 473; 3 Fla., 41.)

The extent and effect of a vendor's lien, however, is not necessarily involved in the present case, except so far as to sustain the decree against the land and to determine whether this lien attaches to the products. The complainant in-

sists that his position is that of a mortgagee, and he assumes in his argument that this is a proceeding to foreclose a mortgage, and that as a mortgagee he has a lien not only upon the land but upon the rents, issues and profits. He cites an opinion of this court (Pasco vs. Gamble and Poole, 15 Fla., 562,) and claims that it establishes the doctrine that a mortgage is in equity a *charge* upon the products of the land as well as upon the land itself, and his deduction is that a mortgage upon the land is a mortgage upon the products. This is an erroneous view of the rule. A mortgage is a legal and equitable lien upon the land, but it is neither a legal nor equitable *lien* upon the profiits of the land.

This *charge* upon the produce springs out of the peculiar circumstances of the case and is not *per se* an incumbrance upon the crops, but the enforcement by the court of conscience of an equitable principle. As was said in Pasco vs. Gamble, "equity makes the mortgage, as between mortgagor and mortgagee a charge upon the rents and profits whenever the mortgagee is insolvent and the security is inadequate and especially is it the duty of the purchaser in possession to keep down the interest." In this aspect, it is said by some of the authorities, "the land with all its produce" is regarded as a security for the mortgage debt, as between the mortgagor and the mortgagee, and where the security of the land is hazardous or clearly insufficient, a receiver may be appointed for the purpose of subjecting the rents and profits of the mortgaged land, *thus charging* the produce with an equity, though up to the time of the order of sequestration there was no lien upon it.

It will thus be seen that the rule indicated in Pasco vs. Gamble was not that a mortgage upon the land covered also the crops and produce, but that under peculiar circumstances equity would charge the crops and profits. Yet, though the products may be subjected, or charged in equity with unpaid interest, taxes, &c., they cannot be said to be

encumbered so as to give a preference to the mortgagee or vendor claiming a lien upon the land as against another creditor who may obtain an express lien upon the crops under the statute, or by chattel mortgage or execution. (Gilman vs. Brown, 1 Mason, 221; 1 Leading Cases in Equity, 4 Am. from 4th London Ed., Tit. "Vendor's Lien," 496-502.)

The question here is confined to the status of the crops grown upon the land. We have cited and alluded to some authorities upon the question of the effect of a mortgagee's and of a vendor's lien, only to illustrate the character of the claim and its effect upon the rents and profits.

The mortgage given by the defendant Davis to Bellinger covered the crop of cotton in question and was executed, acknowledged and recorded long before the filing of complainant's bill. Whether viewed as an ordinary mortgage to secure supplies and advances and to secure other indebtedness, or as a statutory lien created under the act of 1870, (Ch. 1739,) to secure advances, can make no difference here. If the defendant Bellinger acquired the first lien upon the crop he may enforce it, by appropriate proceedings, as a prior incumbrance. The fact that some portion of the advances were made by Bellinger after the filing of the bill is not important, so far as such advances and supplies were furnished in pursuance of the terms of the mortgage and therefore secured by it.

The result of our view of this case is that the decree, so far as it affects the defendant Bellinger, must be reversed and set aside and the cause remanded with directions that the bill be dismissed as to Bellinger, unless within a certain time to be named by the order of the Circuit Court, he shall file his cross-bill setting up his rights as against the complainant and his co-defendant Davis, with the proper prayer for relief, and it is further ordered that the defend-

ant Bellinger pay the costs incurred by the complainant in this court, including the costs of the appeal.

WILBUR F. JENKINS, ET UX., APPELLANTS, VS. ALEXANDER S. MERRITT, APPELLEE.

1. Where the record discloses objections to interrogatories not acted upon by the court, and there is no motion to supress the depositions, or other like action by the party, or any action by the court, the objections must be treated as abandoned.

2. An estate vested under a will in A., as trustee for B., so long as B. shall live with C. upon the homestead place of the testator, B. and C. living upon the place anterior to and at the death of the testator, presents the case of a testamentary disposition of property upon condition subsequent.

3. When there is no ambiguity in the terms of a will, no doubt or uncertainty as to subject-matter or persons upon which it is to act, no technical words whose strict legal signification must be varied to conform to the intent of the testator, and no doubt arising from a consideration of the whole will, parol evidence of collateral facts and circumstances is inadmissible. Upon the happening of a state of facts not contemplated and provided for by the testator, courts are not authorized to imagine what would have been the desire of the testator under such circumstances and to enforce such presumed desire as a part of his will.

4. Condition in restraint of marriage not being favored, equity will not decree a forfeiture of an estate by implying a condition of celibacy from a simple requirement of co-residence of two females both of whom are unmarried at the death of the testator, one of the females being a niece of the wife of the testator, the other being a daughter of the testator of weak mind and imprudent habits, accustomed to receive care and atention at the hands of the niece.

5. Conditions which destroy an estate are taken strictly, and although a forfeiture must be enforced when clearly established, it should not prevail upon doubtful testimony.

Appeal from the Circuit Court for Jackson county.

The facts of the case are stated in the opinion of the court.

D. L. McKinnon for Appellants.

To the first assignment of error I would simply remark that as the whole case is open before the court it is not necessary to notice each objection specially, but only the general principles upon which the objections were made.

The second assignment of error brings up the whole merits of the case. It is contended by the appellee that Sarah E. Jenkins forfeited her interest in the will by marrying. There is nothing in the will which even intimates that it was the desire of the testator that she should not marry. The testator certainly did not intend that her marriage should work a forfeiture of her interest, or he would have said so in so many words. Nothing would have been more natural for him to have said, if he had intended that it should be one of the conditions upon which she would be entitled under the will. On the contrary, the answer of Sarah E. Jenkins to the third cross-interrogatory, which is uncontradicted, shows that the testator did contemplate the marriage of Sarah E. Jenkins, and advised it. She says that he advised her to marry and live there.

It is quite plain, both from the language of the will itself and the testimony, that the intention of the testator was to secure the companionship of Mrs. Jenkins for his daughter, whether married or unmarried, as she understood her physical and mental ailments better than any one else.

It certainly would not be insisted that had Miss Merritt married and Mrs. Jenkins remained single and continued to live with her, it would work a forfeiture of Mrs. Jenkins' interest under the will, unless the principle is conceded that one legatee, under a will, can, by his individual

acts, compel a forfeiture of his co-legatee's interest. If it is true that it would not work a forfeiture in that case, would not the reverse be true when Mrs. Jenkins married, when the will is as silent as to the marriage of one as the other?

The marriage of Mrs. Jenkins by no means prevented her from living with Miss Merritt, within the meaning of the testator. And the fact that she did live with her for several years after her marriage, shows the folly of the position of the appellee. Sons and daughters often marry and still continue to live with their parents, and give them the same care and attention they did before the marriage. So it was in this instance, as the evidence abundantly shows. Mrs. Jenkins testifies that she cared for her the same after she was married as she did before, and that Miss Merritt seemed contented and happy until persuaded away. Since the testator did not see fit to make the marriage of Mrs. Jenkins work a forfeiture of her interest under the will in express terms, the court will not, by a strained construction, impose the condition, especially since it is against the policy of all governments to throw any obstacles in the way of marriages. The testator desired to secure Mrs. Jenkins' society for his daughter, and not her services. She was to be a companion, and not a servant or a slave for his daughter. This function she performed as she did before the death of the testator, until the daughter ceased to live with her "on the place" where the testator intended they should live together, for the will requires her to live with his daughter on the old homestead. She has performed her part of the conditions as far as lay in her power, by continuously living on the place ever since, has always been ready and is still ready to live with his daughter whenever she may return. If his daughter does not see fit to return it is no fault of hers. Therefore the question is, can the non-performance of the conditions

on the part of one legatee defeat the other's interest? I contend that it cannot. If such were the case one legatee might be bought up by the residuary legatee and by his non-performance of his part of the condiitons cause a forfeiture of the other legacies, which would redound to the benefit of the residuary legatee. (Sec. 84, p. 754, Robert's Vt. Dig.; 37 Vt., 483.)

There certainly can be no objection to the co-legatees making any arrangement between themselves as to board. &c., or making any other disposition of their respective shares, since there is nothing in the will to prevent their doing so.

The only material conflict in the testimony is between appellants on the one side and Miss Merritt on the other, in reference to the circumstance of her going to live with appellee. There are two against one, and besides the admitted mental condition of Miss Merritt of itself is sufficient to set her testimony aside, when it conflicts with the testimony of sane persons, whose reputation for truth and veracity is unimpeached.

McClellan & Milton for Appellee.

The first rule in interpreting wills is to be gained by the intention of the testator as gathered from the whole will upon any one subject taken together as a whole. And this will govern, unless it conflict with some well known rule of law.

Again, it is to be read by the surrounding circumstances. The court must put itself in the place of the testator. (Greenleaf Ev., 287-288.) The construction contended for by defendant violates no rule of law. This legacy was given to Miss Rawls to be paid her upon a condition precedent, that she resided with, lived with the testator's daughter at his dwelling and lands adjacent thereto east of

the Chipola, and that it was to cease upon Miss Rawls' ceasing to live with Anna M. Merritt. This was a condition subsequent. It appears from the bill, answer and proof in the case that the defendant recognized the fact by paying the legacy for several years that Miss Rawls complied with the condition precedent; but now claims that she has forfeited her title to the legacy by having ceased to live with Anna M. Merritt.

Where the enjoyment of a legacy is made to depend upon a condition subsequent, and the performance of that condition depends alone upon the legatee, who has the power to do what is required and he fails to perform it, such failure will work a forfeiture of the legacy. (Huckabee Adm. vs. Swoope, 20 Ala., 491.

When this will was made the testator was well aware of the circumstances by which his daughter was surrounded. She was single and likely to remain so, and possibly he was aware that she was not friendly with his son Alexander S.; that besides that her health was not good. His son Alexander S. had a wife and large family of children. His other son was young and single, but in all probability would marry and have a family also. Miss Rawls had lived with him as a member of his family and was known to be an excellent lady. It was his purpose to provide for her comfortably for life. He never expected her to marry. This is evident from the fact that in the provision for her he does not provide for any offspring. While he could not make a provision in prohibition of marriage, he evidently intended to secure Miss Rawls, for her assistance and companionship for his daughter, an annual sum of money, and the further sum upon the death of his daughter of $1,000, and to leave her free to forfeit the annual sum and life sum by marrying if she chose, by voluntarily *ceasing* to reside with his daubhter; to do so whenever she thought she could do better. He certainly

never did contemplate that Miss Rawls should marry a husband, and that he too should live with Anna M. and S. E.; that a strange family should take possession of the premises; that she should invest the household with another head. His intention certainly was that none other should live there than the two ladies.

When Miss Rawls became Mrs. Jenkins her whole relation was changed; she became subject to her husband; she no longer had control even where she should live; she was subject unto her husband; she lost her free agency. Bright's Husband & Wife.

The legatee, S. E. Rawls, has ceased to live with Miss Merritt; she married Jenkins and lives with him; is subject to his control; he is bound to provide for her, and she is in duty bound and by all legal rules to live with him and where he lives.

There is no provision made in the will for Sarah E. to have a husband while she is living with Miss Merritt. If she marries, the law-custom and the duty of the wife is to go with and live with her husband. This testator is presumed to have had in view when he made his will all of the relations of life that the legatee might be called upon to fill. He certainly had an idea that the time would come when the contingency would arise when Sarah E. Rawls would not continue to reside with his daughter; when she would cease to live with her, and then he provides that the bounty given her should go over to his daughter.

There could be, in the course of human events, many causes to bring about this contingency:

1. The time when she could make an advantageous marriage and go to live with her husband.

2. When she should find living more profitable and agreeable elsewhere.

3. When she should find it more agreeable, although not so profitable.

4. By making herself so disagreeable that Miss Merritt could not tolerate her living with her.

The condition upon which there was to be a perfect use of the legacy has been forfeited. The legatee, Miss Rawls, married; her husband and she went to keeping house as man and wife; they took Miss Merritt to board; she lived with them, and she has, in her judgment, from the change of circumstances, been forced to quit the domicil prepared for her by her father and live elsewhere. The whole manner of living there is changed. Instead of its being Miss Merritt and Miss Rawls living there, it is Mr. Jenkins and wife, and Miss Merritt is a boarder, and Miss Merritt not liking her boarding-house seeks another. Miss Rawls' marriage rendered it impossible for her to comply with the terms of the will when she ceased to be Miss Rawls and became Mrs. Jenkins. She was no longer the person provided for by the testator. He never would have imposed or intruded upon his daughter a husband for Miss Rawls to live with her, or he would have said so in his will. Marriage effects a radical change in the relations of life. There is nothing that can make so radical a change. The thoughts, affections, the hopes, the whole disposition is changed to every one around us. Miss Rawls has married an estimable gentleman. But suppose Miss Rawls had intermarried with a person of very unfortunate characteristics, would Miss Merritt be bound to receive him as a member of her household? Certainly not. This illustrates the fact that Miss Merritt was not bound to receive any husband that Miss Rawls might marry, and shows that when she married she ceased to live with Miss Merritt; that she then forfeited her claim to the legacies under the will of E. J. Merritt, deceased. He certainly could never have contemplated, for a moment, that Miss Rawls was to marry and continue to live there after that event. Did he intend to bring about the result that has happened by this

marriage? This intention is certainly not to be gathered from the will. He provides these parties with some $700 per annum, a house to dwell in, and some land from which they might derive some revenue. His object was the comfort of his daughter for life. He intended the same means for his daughter's comfort when Miss Rawls ceased to live with Anna M., for he gave to Anna M., out of which she might procure the company, the service of another lady, or go elsewhere to reside.

By the terms of the will Miss Rawls was to reside with Miss Merritt at the homestead. There is no provision for Mrs. Jenkins to reside there. By her marriage she lost her individuality; she changed her status; she changed her legal status; she yielded up her self-control; she became subject to the control, direction and disposition of her husband. Miss Merritt had a right to deny a residence there to Mr. Jenkins, and Mrs. Jenkins must follow her husband's destiny. The fact that Mr. and Mrs. Jenkins were permitted to stay there, to make an effort to live there and for Miss Merritt to board with them, cannot affect the construction of the will as to the legacy. The effort to adapt herself to the changed condition of Miss Rawls cannot affect it. Miss Merritt is not the only person interested in this legacy. The remainder men are interested in the $1,000 legacy.

Miss Rawls and Miss Merritt were to live there as they were at the death of the testator. Miss R. was to live with Miss Merritt, not Miss Merritt with Miss Rawls and her husband, or a husband. It is clear that no husband was contemplated for Miss Rawls to live with her and Miss Merritt.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The bill in this case is filed by Jenkins and wife in the

Circuit Court of Jackson county against Alexander S. Merritt.

The equities set up in the bill are that Ethington J .Merritt died on the 19th day of November, A. D. 1873, having made his last will and testament to the effect following:

First. I give, devise and bequeath unto my son Alexander S. Merritt six thousand dollars in bonds of the Western and Atlantic Railroad Company of the State of Georgia, and four thousand dollars of the bonds of the New York and New Haven Railroad, and the lands on which my dwelling-house is situate, and the lands adjoining the same on the east side of the Chipola river, to be held upon the following trust and confidence and to and for the following uses and purposes: The said A. S. Merritt will pay annually to my daughter Anna Maria Merritt, and my friend Sarah Elizabeth Rawls, the interest accruing on said bonds during the lifetime of my said daughter Anna Maria Merritt; *provided* that the said Sarah E. Rawls shall reside with my said daughter, and if the said Sarah E. Rawls should cease to live with my said daughter, or my said daughter should die, the said Sarah E. Rawls not having left her, then and in that case the said A. S. Merritt is to pay to the said Sarah E. Rawls one thousand dollars in full for all her interest in said bonds, and her interest in said bonds is to belong to my daughter Anna Maria Merritt. And the said trustee A. S. Merritt is to hold the real estate above mentioned for the use and benefit of my daughter Anna Maria Merritt and my friend Sarah E. Rawls for and during the life of my said daughter; but the said Sarah E. Rawls' interest therein is to cease at the death of my said daughter, or when the said Sarah E. Rawls shall cease to live with my said daughter on said place, in which latter event the interest in said real estate intended hereby for the said Sarah E. Rawls is to cease and vest in my said daughter, and in the event of the death of

my said daughter the said railroad bonds, subject to the payment of one thousand dollars to Sarah E. Rawls, as above stated, and the real estate hereinbefore mentioned, the said trustee is to deliver the same, dischargd from this trust, to my sons Alexander S. Merritt and Ethington J. Merritt, Jr., and I hereby give, devise and bequeath the same to my said sons, their heirs and assigns forever.

Second. I hereby direct my executors to deliver to my friend, Sarah E. Rawls, the bedstead, bed and furniture, and the silverware owned by her aunt, my late wife, and intended by her for the said Sarah E. Rawls; the said silverware does not include a silver ladle which belongs to me, and which I give to my daughter-in-law, Mary F. Merritt.

Third. I give to my daughter, Anna Maria Merritt, and my friend, Sarah E. Rawls, a liberal and generous support for a year after my death, to be supplied out of my estate by my said executors.

Fourth. I wish it to be understood that the payment of one thousand dollars to Sarah E. Rawls is to be paid upon the condition that she lives with my daughter, Anna Maria Merritt, until her death, and on that condition only.

Fifth. I give, devise and bequeath unto my sons, Alexander S. Merritt and Ethington J. Merritt, Jr., all the balance of my property, real, personal and mixed, to them, their heirs and assigns forever.

Sixth. I appoint my sons, Alexander S. Merritt and Ethington J. Merritt, Jr., executors of my last will and testament, made by me this 23rd day of July, A. D. 1873.

"That upon the death of the testator at the date stated A. S. Merritt accepted the trusts created by the will, entered upon the execution of the same, and continued to pay over the annual interest on the bonds due to your oratrix up to the 19th day of November, 1875, since which time he has refused to pay the same or any portion of it;

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that your oratrix continued to live on said place with the said Anna Maria Merritt until about the 17th day of March, 1876, when the said Alexander S. Merritt induced her to leave said place and come to reside with him in Marianna, for the sole purpose, as plaintiffs believe, to defeat, if possible, your oratrix's right to the interest upon said bonds that he might reap the benefit of it himself; that your oratrix has continued to reside at said place ever since the death of the testator, and is, and has been willing that the said Anna Maria Merritt should reside there with her, and believes that if the said Anna Maria Merritt was left to her own will, she would return and live with her that she has so expressed herself to your oratrix since she left, but having an imbecile mind she is an easy victim of the said A. S. Merritt; that it was on account of her imbecility of mind and incapacity to take care of herself, recognized by her father, Ethington J. Merritt, that said will was so worded as to require your oratrix to live with her in order to secure the benefits of the provisions of the will.

"That your oratrix lived with the said testator as a member of his family for seventeen years, his wife being her aunt; that she had a great deal of the care of the said Anna Maria Merritt before testator's death, and that she continued to give her the same care and attention up to the time she was induced to leave through the devices of the said Alexander S. Merritt; that she is informed and believes that she persistently refused to leave until overpowsuaded by one H. B. Grace, whom the said Alexander S. Merritt employed for the sum of fifty dollars for that purpose; that after being induced to leave her and go to the said A. S. Merritt to live, she ran away from his place and came back to your oratrix and told her that she had rather live in a little bathing-room attached to the dwelling on a dry crust of bread than to have to go back and

live with her brother; that she believes her attachment to her is as strong as it ever was; that she has received messages purporting to come from her to the effect that she intended to return, and that before she could be induced to go back to her brother the second time she informed your oratrix that her brother threatened to take everything she had away and not leave a piece of bread for her to eat if she would not return to his place and live there; that the said Alexander S. Merritt is the sole surviving executor of said will, and owns the remaining interest in said bonds and land. Plaintiffs then charge that his taking his sister, Anna Maria Merritt, from the old homestead and from the care and attention of your oratrix is against the intention of the will, and to defraud your oratrix as well as the said Anna Maria Merritt of the benefit secured to them under the will and to himself profit thereby.

Plaintiffs pray an account of the interest alleged to be due, and for decree for that sum with interest thereon, and for a further decree directing the trustee to pay over annually her share of the interest upon said bonds so long as the said Anna Maria Merritt shall live and your oratrix resides upon said place and is willing to live with the said Anna Maria Merritt.

ANSWER OF DEFENDANT.

Defendant, A. S. Merritt, answers admitting that he accepted the trust as alleged, affirming that he has refused to pay the interest upon said bonds since November, 1875, because he believes that complainant, Sarah E. Jenkins, formerly Sarah E. Rawls, has forfeited all right and title to the same by her intermarriage on the 5th day of October, 1874, with complainant, Wilbur F. Jenkins; that by said marriage she became subject to the direction, will and control of her husband, and that so soon as she entered upon her married life she ceased to live with Anna Maria, and

forfeited all right to any of the provisions of the will. Defendant denies the charge as to his employment of Grace to induce his sister to come and live with him, and affirms that soon after his father's death designing persons caused his sister to become unfriendly to him, and that this unfriendliness was kept up by those nearest to her for some time, and that during this time he treated her with the utmost kindness and had for her a brother's love. Defendant further answers that he is informed and believes that his sister, Anna Maria, opposed the marriage and objected to the husband's coming to the homestead to live; that his sister is now about forty-four years of age; that she has been raised tenderly and in his father's lifetime lived bountifully; that for some years she has been afflicted with disease peculiar to her sex that greatly impairs her nervous system, and that having a mind not naturally strong her mind is often in acute sympathy with her bodily afflictions and is more or less impaired. Defendant alleges that he has never for one moment sought to take advantage of this weakness; that he has felt for her great sympathy, and has at all times been willing for her to make his house her home. He alleges that shortly after the marriage of plaintiffs he is informed that both of them made an effort to procure the said Anna Maria to make a deed of gift to the said Sarah E. of all her interest in the property given to her by her father's will; that in three months after their marriage they inaugurated at the old homestead a different order of things than that contemplated by the will; that the husband took entire control of the house and plantation, he and his wife then contracted with and taking the said Anna Maria to board with them for the year 1875, at ten dollars per month, and that this state of facts existed all the time Anna Maria lived there during that year; that during the year 1875 his sister made complaint to him that the mode of living of complainants was so different from

what she was accustomed to that she was unable to stand it, and could not so continue to live; that defendant advised her to set up for herself, and if she could not do that she could make his house her home; that during that year the said Wilbur F. Jenkins was heard frequently to declare that he intended to show the said Anna Maria that the said Sarah E. was no longer subject to her beck and call; that she was his wife and freed from the said Anna Maria forever thereafter; that in November, 1875, he paid to the said W. F. Jenkins for his wife one half of the interest due upon said bonds; that he believes he acted in abuse of his trust and that the said Sarah E. had forfeited all title and right to the interest thereon since her intermarriage with the said Wilbur F. Jenkins on the fifth day of October, 1874, and he asks that this answer be treated as a cross bill, and that the plaintiffs be decreed to pay back the same.

Defendant further answering says that in October, 1875, his sister, Anna Maria, voluntarily came to his house and has ever since made it her home, and that he feels that the ties of kindred and his duty in her condition is to make his house a welcome home to her, and that he is at all times willing to extend that kindness to her which her afflictions so urgently demand; that the said Wilbur F. and Sarah E. have enough to do to take care of their own family, which is increasing as time is passing; that in January, 1876, he asked the complainant Wilbur F. what he and the said Sarah E. expected to do for the said Anna Maria, to which he replied that they would board her for ten dollars per month when she was well, but that when she was indisposed she must pay more; that respondent informed him that, if such were his views, he would care for her himself, and from that time he has refused to pay to the said Sarah E. any part of the provision for her under the will, believing that she has ceased to live with the said

Anna Maria in the intention expressed in said will; that the said Wilbur F. has been in possession of the lands since 1875, paying no rent therefor for the year 1875, paying a small rent for 1876, and agreeing to pay $75 for the half interest for the year 1877.

Defendant then claims the right to recover all sums paid since the marriage, and asks that his answer be treated as a cross bill.

To so much of this answer as relates to the matter of cross bill, there were exceptions taken by plaintiffs. By consent, this matter excepted to was subsequently stricken out. There were replication proofs, hearing and a decree dismissing the bill at plaintiff's cost. From this decree this appeal is taken. A reversal is sought here upon two grounds: The first ground is alleged error in "overruling the several objections of complainants to the interrogatories propounded by defendant."

The record fails to disclose any action in reference to these objections taken by the court. The record recites simply that the cause was heard "upon bill, answer, replication and evidence." While there are some objections taken to the interrogatories of the defendant by the plaintiff to be found in the record, yet no action of the court in this matter is shown. It does not appear that any motion to suppress the depositions, or any part thereof, was made by the plaintiffs below, (the appellants here,) and in such case the objection must be treated as abandoned.

The discussion of the only remaining ground upon which a reversal is sought involves a consideration of the merits of the cause as it appeared from the pleadings and proofs. That ground is that the court erred in denying the prayer of the complainant's bill, and ordering the bill to be dismissed.

We have already stated the substance of the pleadings.

The substance of the testimony may be briefly stated as follows:

Miss Sarah E. Rawls was a niece of the second wife of the testator and had known the testator and his daughter, her co-legatee, Miss Anna Maria Merritt, since 1857. Her residence with the family commenced during her childhood; for a long time she was treated as a member of the family and "assisted in keeping house." Miss Anna Maria Merritt, the daughter of the testator, was of "weak and imbecile" mind, "addicted to imprudent habits, requiring care and special attention." She was peculiarly a proper subject for the sympathy as well as the care and attention of Miss Rawls, and there is no question that, during the life of the testator, such sympathy was felt and such care and attention extended to her.

The testator died on the 19th of November, 1873, leaving the will, a copy of which is set forth in the beginning of this opinion. The defendant, the son of the testator, is the executor of this will as well as the trustee named to execute the trusts created for the benefit of his sister, Anna Maria Merritt, and the inmate and friend of his father's family, Miss Rawls. He is also residuary legatee and devisee. After the death of the testator, Miss Merritt and Miss Rawls resided together upon the old homestead until March 17, 1876. On the fifth of October, A. D. 1874, Miss Rawls married Wilbur F. Jenkins. To this marriage Miss Merritt at first objected, but afterwards consented. Mr. Wilbur F. Jenkins after his marriage resided with his wife and Miss Merritt upon the homestead place and assumed the general control of the household as its head. To this no objection was made by Miss Merritt so far as the testimony discloses.

At the death of her father there was for some time no communication between Miss Merritt and her brother, the defendant, and she was not friendly to him. In 1875 this

feeling of unfriendliness ceased and she made her brother her agent. He rented Mr. Jenkins the land for the year 1876.

Thre is some difference as to the terms upon which Miss Merritt boarded with Mr. and Mrs. Jenkins. Mr. and Mrs. Jenkins state that her part of the rent of the plantation was to pay her board, while the defendant states that Jenkins was to charge his sister $10 per month if well, and more if sick.

There is conflict in the testimony as to the treatment of Miss Merritt by Mr. and Mrs. Jenkins before she left to live with her brother. There is evident bitterness and ill feeling between the defendant and the complainants. Mr. and Mrs. Jnkins affirm that every necessary care and attention were extended to Miss Merritt; that she left under the advice and at the solicitation of her brother, whose interest it was, they affirm, to destroy the kind relations existing between the parties and to defeat the purpose of the testator. Mrs. Jenkins swears that she extended the same care and attention to Miss Merritt after her father's death that she did while he was alive; that when Miss Anna Maria Merritt was sick she occupied the same room with her and gave her all necessary attention, and that she was uniformly kind. On the contrary, the defendant testifies that his sister sent for him, expressed a desire to go to his house, and that, as an affectionate brother should have done, he invited her to make his house her home. The only witness who speaks to the fact of treatment, except Miss Merritt and the plaintiffs, was the defendant's witness, Grace, who swears that he was at the house where the parties resided; that there was a difference between the "table fare" of the father of Miss Merritt and that of Mr. and Mrs. Jenkins; that the fare of the latter was not so good as the former, and that he heard Mr. Jenkins in a conversation with Miss Merritt say that Bettie was now

his wife and no longer at her beck and call. On cross-examination, he, however, says that there was plenty on the table; that it was as good as the ordinary country fare; that he never heard any complaint on the part of Miss Merritt when Mr. and Mrs. Jenkins were present, and that he saw no unkindness on their part toward her.

As to this witness, (H. B. Grace,) John P. Saunders, "a minister of the gospel," swears that he had a conversation with him early in the year 1877; that Grace stated that he had been paid fifty dollars by defendant to get him to negotiate with Miss Merritt to get her in a good humor with him, and that it took him two weeks to do it, and that afterwards in the summer of 1877 he (Grace) said the fifty dollars was for attending to a land trade. This statement is denied by Grace, and the defendant says that no money was paid except for service in connection with a land trade.

Miss Merritt, when asked to state "fully" the reasons for leaving the old homestead, said: "I left on account of the marriage of Miss Bettie Rawls to W. F. Jenkins; I disliked Mr. Jenkins." She states again: "I ceased to reside there on account of Mr. Jenkins." When asked generally whether Mrs. Jenkins refused to give her attention when sick, she answered that she did. In answer to a like suggestive question she answered that there was a great change in the manner of Mrs. Jenkins after her marriage; that after the marriage she "dropped" her altogether. She says, "I was in delicate health and could not get the food necessary; I was charged extra prices for the food necessary; that cakes were charged to me; this occurred only when I was sick."

The defendant, the executor and trustee, maintains that Mrs. Jenkins (formerly Miss Rawls) has forfeited the right to one-half of the interest accruing upon the bonds held by him in trust by a failure to comply with the conditions

upon which she was to continue to receive the money. This is the only question in the case.

The defendant, through his attorney here, insists that the legacy was based upon a condition precedent which has not been performed.

Reducing the argument to its elementary propositions, it is that the condition of a co-residence upon the place is violated by the marriage of Miss Rawls and the alleged change in the treatment of Miss Merritt by Miss Rawls after her marriage.

To the questions thus submitted we address ourselves.

We cannot agree with the first proposition that the condition here in reference to the interest of Miss Rawls in these bonds is upon a condition precedent.

The legacy here, so far as the interest upon the bonds was concerned, was conditioned upon co-residence of Miss Rawls upon the homestead place with Miss Merritt, and this is a condition subsequent. True, co-residence must exist in order that the interest should continue, but the condition is upon the continuance of a state of circumstances then existing, and the estate and interest of Miss Rawls vested upon the death of the testator. The legacy here was upon condition subsequent.

The title passed to the trustee, the estate was vested and was to continue so long as there was a continuance of a then co-residence upon the place. 1 Pet., 376; 9 Wheat., 325; 25 Maine, 525; 1 Jarman on Wills; 8 Pet., 326; 14 How., 488.

Chief Justice Marshal in 3 Peters, 374, speaking for the court in reference to this general subject, says, "it is certainly well settled (2 Bos. and Pull., 295; 1 D. and E., 645,) that there are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently, and the question is always a question of intention.

If the language of the particular clause or of the whole will shows that the act upon which the estate depends must be performed before the estate can vest, the condition is of course precedent, and unless it be performed the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent."

In Maverick vs. Andrews, 25 Me., 525, there was a devise to the wife on condition that she should support and maintain in a omfortable and suitable manner the mother of the testator, should she survive him. This was held to be a condition subsequent, the devisee being entitled to enter upon the estate and enjoy it until forfeited by non-compliance with the condition.

Here, upon the death of the testator, the estate vested in the trustee with such powers as usually atend such trusts, and the beneficial use and interest passed to the legatee, to continue so long as her then co-residence with Miss Merritt upon the homestead place continued.

Having determined the nature of this condition, the only question remaining to be determined is, has there been such an act by the legatee, Miss Rawls, as works a forfeiture.

Defendant insists that such acts have been done by this legatee. These acts consist of a marriage and subsequent treatment of Miss Merritt by Mr. and Mrs. Jenkins.

The marriage is admitted. As to the treatment there is conflict in the testimony.

It is insisted by the respondent that the "marriage rendered it impossible for her (Miss Rawls) to comply with the terms of the will; that when she ceased to be Miss Rawls and became Mrs. Jenkins, she was no longer the person provided for by the testator; that so soon as she entered upon her married life she ceased to live with Anna Maria and forfeited all right to any of the provisions of the will;

that by her marriage she lost her individuality, she changed her status and became subject to the control, direction and disposition of her husband."

The general proposition that a legacy to A. or B. is forfeited by marriage, when no such condition is in the will, cannot certainly be maintained. While the marriage of a female results in a change of name or address, it does not change the personal or individual existence of the party named. Her rights under such a will remain. It is true that upon her acquisition of her interest in a will, it may become, in a manner, subject to the control of her husband, but the will not prohibiting the contracting of such relation, it cannot be said that such power or control, as results from its subsequent existence, is prohibited. This suit is restricted alone to the interest of Miss Rawls or Mrs. Jenkins, (for there is a personal identity,) and concerns only her interest arising from the provisions of the will as to interest upon the securities. She is entitled to this money upon the sole condition of co-residence upon the place. There is no other expressed condition. Nothing is provided as to the details and nature of this co-residence. The testator does not direct whether the expenses of the household shall be paid in common, or that the one or the other of the ladies should board with the other. It certainly does not contemplate that Miss Rawls should, from what she was to receive, support and maintain Miss Merritt. There was a provision made for Miss Merritt, and from this fund her maintenance and support was expected to come.

It is insisted that the marriage relation results in its being the duty of the wife to comply with the wishes or directions of her husband as to her place of residence. This may be true, but it is not even pretended in this case that such power has been exercised. On the contrary, for the year 1876, (the time at which Miss Merritt left the home-

stead place,) the respondent, the trustee, rented the land to Mr. Jenkins, the husband, and Mrs. Jenkins, Mr. Jenkins and Miss Merritt were then residing together upon the place. It is also insisted that, looking to all the circumstances, there is an implied condition of celibacy upon a violation of which the legacy was to cease and determine.

It is unquestionably reasonable to presume that the testator expected and desired that Miss Rawls should extend towards his affliicted daughter that care and attention which her situation required. This care and attention, however, is not in any way mentioned as a condition in the will. The testator, as to this matter, trusted to the gratitude and the character of Miss Rawls, as well as to the affection for and attachment to his daughter before that time exhibited by Miss Rawls.

Admitting that such was the desire, the intention and expectation of the testator, and that such unexpressed but reasonably presumed purpose and intention is effective to make such care and attention a condition, (a matter which we do not decide,) we enquire whether marriage alone rendered Miss Rawls unable to give Miss Merritt such aid and assistance. In connection with this question we will also examine the evidence as to treatment. The precise condition of Miss Merritt we cannot ascertain from the testimony. She is said to be of "imbecile" mind. This is simply weakness of mind; but to what extent that weakness exists is nowhere shown. She is also said to have "imprudent habits." This is very general. Without some knowledge of the degree of weakness of mind, as well as the character and nature of the imprudent habits, we cannot, with any degree of certainty, define the nature of the care and attention required by her situation. If this mental and physical state was of such a nature as to preclude the possibility of a married woman giving the necessary attention, it devolved upon the defendant to establish it. The fact of

co-residence being proven, and the fact of marriage being admitted, it devolved upon the defendant to show that Miss Merritt's condition after marriage was such that such attention as was necessary could not be given by a married woman.

Taking the proposition generally, we cannot see that marriage alone, or in the abstract, necessarily rendered it impossible for Miss Rawls to give, or cause to be given, to Miss Merritt all the attention necessary. This would depend greatly upon the character of the man she married. If his wishes were that she should give no attention to Miss Merritt, or that she should not reside with her, a compliance with such a request would involve a forfeiture of the legacy. If, however, she married a man of disposition kind, sympathetic and considerate, one who would appreciate a feeling of gratitude to the source from which his wife derived substantial aid and assistance, then marriage would relieve her of many strictly business duties and enable her to give, or cause to be given, greater attention to her afflicetd friend and co-legatee. In this case the evidence does not establish any unkind treatment by Mrs. Jenkins. The only testimony that looks to this direction is that of Miss Merritt. In considering the testimony we must recollect her condition. What she states is in reply to leading questions; is for the most part general, and when it relates to acts in detail is not satisfactory. Miss Merritt left, she states, on account of Mr. Jenkins, and yet she states that while she first objected to the marriage, she afterwards consented to it when Mr. Jenkins stated that he intended to marry and take Miss Rawls from the place. Her complaint, when precise acts are spoken to, is that she was charged extra prices for necessary food for one in delicate health; that cakes were charged to her; that this occurred only when she was sick. The respondent states that Miss Merritt paid the sum of $10 per month for board, and

the evidence shows that the fare was as good as the ordinary country fare. An extra charge for delicacies we cannot say was improper, there being no obligation upon Mrs. Jenkins to supply and pay for such articles.

With this testimony of Miss Merritt the testimony of Mr. and Mrs. Jenkins is in conflict. It devolved upon the trustee to prove at least such a state of circumstances as would create the necessity for and justify a separation between the parties. In connection with this subject it may be remarked that the defendant and trustee rented the place to plaintiff Jenkins for the year 1876, thus showing a considerable degree of confidence in him. Marriage alone does not destroy the fact of co-residence, nor does it necessarily create a cause for or justify a voluntary separation by the act, in this case, of Miss Merritt, nor is any treatment justifying separation proved.

We have thus treated this question upon the hypothesis that there might have been such a state of circumstances as would justify a separation by Miss Merritt, and a forfeiture of the legacy by Miss Rawls. The proof establishes no circumstances of this character, and for this reason it is unnecessary to announce any legal principle upon such a hypothetical state of facts.

Leaving this discussion upon the facts, we will state the principles of law which we think are applicable to the subject.

This is a testamentary disposition of personal property, a bequest, upon condition subsequent, the property being given over upon non-performance of the condition.

A condition of co-residence of one legatee with another, both being at the time unmarried ladies, one the daughter of the testator requiring care and attention, being of weak mind and imprudent habits, the other being the niece of the testator's wife, for a long time an inmate of his family, an assistant in "keeping house."

There is no ambiguity in the will. The condition is simple co-residence upon the homestead place. A few years after the death of the testator the niece of his wife marries and his daughter leaves the place.

The law is, that where the bequest is made in plain terms and upon a condition plainly named, no additional condition can be added where there has been a change of circumstances from those existing at the date of the execution of the will and the death of the testator, upon what may be presumed would have been the wish of the testator under such changed circumstances. The testator may or may not have contemplated the marriage of Miss Rawls, but in the absence of anything relating to the subject in the will, the court cannot make it a condition of the enjoyment of the bequest. As stated in the case of Madison vs. Chapman, 5 Jur., N. S., 277, "it cannot be conjectured what the testator would have done if the state of things that has happened had been present to his mind." It is true that there are many cases in which the strict signification of technical terms is varied to meet the obvious intention and purpose of the testator; thus the words heirs and heirs of the body are often held to be descriptive of persons, and as words of purchase and not of limitation, but where there is no ambiguity, and "where the meaning of the words used by the testator is clear, it must be adopted, whatever the inclination of the court may be." (Stewart vs. Jones, 5 Jur. N. S., 299.)

We have a strong illustration of this rule in the case of Brandow vs. Brandow, 66 N. Y., 401. In this case the provision of the will was, "I do hereby will in trust to my wife Elizabeth all my property, both personal and real, whatsoever and wheresoever, during her lifetime. In consideration of which it shall be her duty to care, protect and educate our children until they are of age." Upon the death of the widow the question arose whether the ex-

penses of the care and education of the minor children was a charge upon the estate. Any one would presume such to have been the desire of their father. The court of appeals say the words of the will are plain, the estate of the wife was a life estate, and the trust was limited to it. In answer to a suggestion that if such a state of things had been contemplated by the testator he would no doubt have so desired, the court say he may not have contemplated the contingency of the death of the widow before the children were of age, but it is the duty of courts to give effect to the intention expressed in the will, whatever they may suppose the testator would have done if the particular event which has happened had been foreseen.

As remarked by the Chancellor in the case of Wilbraham vs. Scarisbrick, (1 H. L. C., 188, Story's Eq. Jur., 1074, B. & F., 11 Ed.,) "such imputed intentions are in most respects speculative and uncertain, and where any are to be found which the construction of the clause in question, according to its ordinary meaning, will not carry into effect, or may defeat, it is more probable that such failure will arise from the testator not having contemplated or provided for the very many events which may be supposed as possible to arise in the family, than that he used such expressions in any other than the ordinary meaning. The clause being plain and simple in its language, we do not think the rules of construction, now considered as settled, will warrant the clause receiving a construction other than according to its ordinary meaning, without its appearing satisfactorily from other parts of the will that the language was used by the testator in some other sense." (See also 27 Vmt., 485.)

The only authority called to our attention in this connection by the respondent is the general language of Mr. Greenleaf, (Greenleaf Ev., 287,) to the effect that the object of the court in construing a will is to follow the inten-

tion of the testator, and to do this "the court may put themselves in the place of the party and then see how the terms of the instrument affect the property or subject-matter." This applies to cases where the meaning and application of words used cannot be ascertained without evidence of all these facts and circumstances, and to cases of like character. No authority can be found for the view that the circumstances surrounding the testator can be considered to determine what would have been his intention in the event of a change of the circumstances existing at his death not anticipated by him.

The general rule is, that to admit evidence of extrinsic and collateral facts, there must be some difficulty in applying the words of the will to the subject-matter, or to the persons interested in the bequest or devise.

Again, the condition which we are to add here is in restraint of marriage. In view of the law in relation to that subject, we can entertain no doubt at all that we would violate the uniform rule which controls the matter by implying such condition.

Even express conditions prohibiting marriage, as a condition of enjoying personal legacies, whether such conditions are precedent or subsequent, are not favored by the courts. 2 Ver., 573; 2 Atk., 616; 1 B. C. C., 303; 10 Ves., 230; 3 Whar., 575; 10 Pen. State, 75; 8 Maryland, 517; 6 Mass., 169; 3 Red., 244-47-61.

Mr. Justice Story thus states the general principle, (1 Story's Eq., 280,) "conditions annexed to gifts, legacies and devises in restraint of marriage are not void if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then, indeed, as a condition against public policy and the due economy and morality of domestic life, it will be held utterly void." For very clear statements of the

principle see also 1 Fonbl. Eq. 1, Ch. 4, §10, note q.; 1 Simons, N. S., 37.

Lord Mansfield, in Long vs. Dennis, (4 Burr., 2055,) said, "conditions in restraint of marriage are odious, and are therefore held to the utmost rigor and strictness." Lord Eldon seems to have thought this expression too general, (19 Ves., 19,) but his views are not in conflict with the general rule as announced by Mr. Justice Story.

Certainly, in view of these rules, we cannot by implication add a condition in restraint of marriage, when we find nothing in relation to the subject in the will.

There is but one other principle, as we conceive, applicable to this case in its various phases, which we have not considered. That is the question of the forfeiture of a conditional legacy.

The respondent, as a defence, insists upon a forfeiture by condition broken.

The case of Hogeboom vs. Hall, (24 Wend., 148,) treats at some length of this question. In that case the testator gave a farm to his son in fee, upon condition that his daughters should have the use and occupation of a room in his dwelling house and be provided with food, raiment and fuel as long as they remained unmarried. The daughters left the house and remained away voluntarily for several years. There was other evidence from which the daughters insisted that there was a forfeiture of the estate. Mr. Justice Bronson, for the court, says, "conditions which destroy an estate are taken strictly, and although a forfeiture must be enforced when clearly established, it should not prevail upon doubtful construction of evidence. The plaintiff insists on a forfeiture, and the burden lies upon her of showing the condition broken."

It is unnecessary to elaborate a principle so generally recognized as this, and we say nothing more on the subject.

Entertaining these views, the result is that the decree of the Circuit Court must be reversed.

The decree is reversed. The case will be remanded with directions to state an account between the parties upon principles consistent with this opinion, and for further proceedings conformable to law and equity in this behalf.

HYER'S EXECUTORS, PLAINTIFFS AND RESPONDENTS, VS. CARO'S EXECUTRIX, DEFENDANT AND APPELLANT.

1. The defendant having consented to the filing of a supplemental bill and demurred thereto, cannot afterwards object on the ground of irregularity, such consent and pleading being a waiver of any irregularity in practice or pleading which might have been available.

2. A part owner of a ship cannot recover of another part owner in possession for negligence in the management of the common property which does not amount to a wrongful destruction of it, and the latter is not liable in a suit in equity to account to the former for earnings which might have been made by greater diligence, e. g., by making a greater number of possible voyages, no express contract being violated.

3. A part owner of a ship being in possession and control, and acting as master by virtue of his control as majority owner, is not such general or special agent of the minority owner as to create the specific liability which commonly attaches to the character of an agent in respect to the diligence due to an employer as between principal and agent.*

4. In common law actions the evidence taken upon the trials is no part of the record, unless made so by bill of exceptions. In chancery causes, all of the evidence taken is a part of the record, without the formality of a bill of exceptions. Hence, in common law cases,

*Head-notes, 1, 2 and 3 were prepared by the Chief-Justice as the syllabus to the opinion on the original hearing, and the others by Mr. Justice Westcott as the syllabus to the opinion on the re-hearing.

in the absence of a bill of exceptions, action of the Circuit Court, taken with reference to facts which should appear by bill of exceptions, is presumed to have been justified by the evidence. In chancery causes, the presumption being that the record, as certified, contains all of the evidence, the action of the Circuit Court, based upon the evidence in the record, is to be examined with reference to the record, and the record is to be taken as containing all the evidence material in the cause. In equity causes any omission must be supplied by *certiorari*, which may issue at the instance of the appellee under the rules, or by the court in cases where it is satisfied that what is omitted is material in the consideration of the case.

5. In chancery causes, in cases involving matters of account, where the books, or extracts therefrom, used before the master in stating an account, are not in the record certified to this court, it is not the practice of this court to affirm a decree upon the presumption that the books contained evidence of independent facts in addition to what is reported or referred to by the master.

6. An appeal from a final decree in a case in chancery commenced before the Code, but decided after its repeal, opens for consideration all prior interlocutory orders or decrees connected with the merits of the final decree.

7. Error in an interlocutory decree, in that it is too broad, granting relief outside of the case made by the facts alleged in the original bill, is cured by the defendant consenting to the filing of a supplemental bill alleging the additional facts and making a corresponding prayer.

8. At common law, one tenant in common of a chattel had no method of dispossessing his co-tenant. All being equally entitled to possession, one in actual possession had a right to maintain it against the other, and was not liable, in the absence of an agreement, express or implied, imposing such liability for a want of industry and diligence in its use, nor could the tenant out of possession compel the tenant in possession to use or employ the chattel.

9. The rule stated in the previous note did not, in some respects, apply to ships. The employment of a ship being a matter of public concern, a tenant in common in possession was not permitted to let the ship remain idle against the wish of his co-tenant. As a means to enforce such employment, however, a part owner in possession was not held responsible in a court of common law or chancery to another part owner for a want of industry in the use of the ship. The means by which employment was secured were other than

this, and the jurisdiction to enforce the right was to be found in a court of admiralty.

10. There are three kinds of possession of a chattel by a tenant in common: One in reference to title. Here the possession of one is possession of all, and such presumption is destroyed only by actual ouster or clear proof of adverse possession. Two, in reference to employment or use. First, a possession resulting from agreement between the parties, express or implied from circumstances. Here an actual use, although by one, is still a common employment for a common benefit, regulated by the contract. Second, a possession not referable to any contract or agreement between the parties—a possession by virtue of his right as part owner or co-tenant.

11. Where any special liability to one tenant in common arises out of the possession and use of a ship by his co-tenant or part owner, under an agreement between them, express or implied, as to use, the co-tenant seeking damages for a violation of this agreement as co-tenant, must allege facts constituting such agreement or contract, and, in the event they are not admitted or are denied, must prove them.

Appeal from the Circuit Court for Escambia county.

This is a suit commenced in chancery in May, 1859, prior to the adoption of the Code of Procedure, but the final decree was not rendered till after. The bill of complaint was filed by the respondent's testator against the appellant's testator.

The following extract from the Master's report filed June 11, 1860, will indicate the theory of the same:

"I have stated the account of the amounts which the schooner Powhatan, mentioned in the decree, has earned since the 25th day of September, A. D. 1856, as well as the amounts which she might have earned by the exercise of due diligence, together with the balance due compalinant at the several periods of settlement, after allowing defendant for all proper disbursements, &c., according to the directions of the decree; charging said defendant with interest on said balances from the date of their becoming due up to the time of the stating of his account; the par-

ticulars and items of which account appear in schedule 'A' hereto annexed and forming a part of this report.

"That in arriving at a conclusion as to what amount of money might have been earned by said schooner if proper diligence had been used, I have been guided by the evidence before me as to the qualities and facilities of the vessel and the number of trips which she might and ought to have made during each year, and have charged defendant with the number of additional trips which, when taken together with the trips he actually made, would amount to the number specified; and have charged defendant, as the earnings of every such trip, with the average amount he earned, according to his own admission, by each trip actually made, allowing him for every trip so charged, and which was not actually made, the proper credits.

"That in allowing defendant credits for each additional trip with which I have charged him, but which he did not actually make, I have taken the average of all incidental expenses attendant upon the vessel when making trips, as shown by her books, within each period of time extending from settlement to settlement, and have allowed defendant accordingly.

"That in computing the interest, which ought to run from every date when a settlement was due, I have, in the absence of all evidence on this point as to the agreement of the parties, or the custom of the port, adopted such dates of settlement as I find in defendant's book as points from which to work.

("A.)

"Philip A. Caro, master of schooner Powhatan, in account with Henry Hyer, part owner: DR.

1855.

March 9.—To amount earned by 4 trips, from Sept. 24, 1854, to date, as per Caro's admission $2,870.15

March 9.—To this much more that ought to have been earned (at the rate of 14 trips per annum) 1,212.00

$3,582.15

" 9.—By amount of actual expenses and disbursements..$1,908.93

" 9.—By amount of actual expenses that would have been incurred in extra trips 140.00- 2,048.93

$1,533.22

" 9.—To one-fourth of above balance due Hyer ....$ 383.30

" 9.—By amount paid Hyer..... 94.37

Balance due .....$ 288.93

1860.

June 11.—To interest on balance to date at 6 per cent ....$ 98.84

June 11.—Balance due Hyer this date.....$387.77"

The account is carried on on similiar principles through the several years to June 11, 1860, and shows a balance of $4,112.53 due complainant.

The consent to the filing of the supplemental bill was endorsed on the petition of the complainant for leave to file such bill, and is in the following words: "Notice of filing acknowledged and consent given to file the supplemental bill within ninety days," and is signed by the defendant's solicitors. On the 26th day of June, 1866, the day the petition was filed, the Chancellor made an order granting leave "to complainant to file a supplemental bill, and by consent the same may be done in sixty days."

The final decree or judgment appealed from was rendered April 6, 1876. It adjudged that complainants as executors recover of the defendant as executrix $4,112.53, the amount reported by the master, and interest at six per cent, from June 11, 1860, making principal and interest $8,015.92, and costs and allowances.

The other facts are stated in the opinion of the court.

A. E. Maxwell and *W. A. Blount* for Appellant.

E. A. Perry for Respondents.

THE CHIEF JUSTICE delivered the opinion of the court.

The point first discussed in the briefs of the counsel relates to the regularity as a question of practice of the filing of the supplemental bill under which, and upon the testimony taken prior to filing it, the decree was pronounced. It is insisted by the counsel for appellant that the supplemental bill was irregularly and improperly filed.

There are, however, two valid reasons why this objection, though perhaps tenable in other respects, should not have weight here; the first of which reasons is, that the solicitors for the appellants (defendants) consented in writing, as appears from the record, to the filing of the supplemental bill, being fully advised of its entire scope and purpose by the petition addressed to the court praying leave to file it; and the second is, that the defendant demurred to it, thus placing in issue before the court the matters of law and fact contained in the bill.

This supplemental bill is at most an amendment of the original bill containing grounds and prayers for relief additional to those of the original bill, and was filed eight years after the original, and five or six years after the despositions and the master's report were filed and exceptions thereto taken. It cannot be said, therefore, that either party acted

unadvisedly, and whatever objection to thus amending the bill might have been available to the defendant as a question of practice, it was waived by the consent and the demurrer.

The demurrer brings up the merits of the supplemental or amended bill.

The original bill was brought against the defendant Caro, who owned three-fourths of the schooner Powhatan and who acted as her master and manager, for an accounting to the complainant Hyer who owned one-fourth for his share of the earnings. The depositions taken under a decree of reference to a master covered not only the matter of the ship's earning and expenses, but also the subject of the delay and want of diligence of the defendant "as master and part owner" in the management of the vessel, and the master's report, purporting to the based upon the proofs so taken, contained an estimate of freights which might have been earned, deducting expenses which might have been incurred, if the ship had made more frequent trips, which she might have made, between Pensacola, her home port, and New Orleans, where she was engaged in the coasting trade, and allowing interest from time to time upon such possible earnings.

Exceptions having been filed to this report, the complainant, deeming that his original bill did not cover the entire scope of the proofs and of the report, and claiming that the proper allegations and prayer of the bill to cover these grounds had been omitted by mistake or inadvertence, petitioned for leave to file the supplemental bill, setting forth the matter sought to be brought in, and the defendant consenting, the supplemental bill was filed.

The matter thus charged is "that from the 25th day of "September, A. D. 1854, up to the time of taking the said "account, the said respondent, Philip A. Caro, as master and "part owner of the said schooner Powhatan did not exercise

"due diligence, but was guilty of such gross neglect and mis-"management as to seriously damage your orator as one-"fourth part owner of said schooner." The prayer is "that your orator may have relief against the respondent "for such neglect and mismanagement, and that said re-"spondent may be held liable for what the said vessel "might have earned for your orator by the exercise of due "diligence on the part of said respondent, of which, under "the said decree of this court, an account has already been "stated and filed in this court as will more fully appear by "reference to the said master's report and account now on "file in this cause."

The defendant demurred to the supplemental bill, that it does not set forth a case entitling the complainant to the relief prayed, and he says in his argument that the demurrer should be sustained, because (1) Caro, being part owner, was not responsible to the other part owner for any loss of profits by negligence; (2) because the continuance of such negligence was avoidable by Hyer and was not avoided, and (3) because Caro could not be charged with the contingent and speculative profits claimed.

The Chancellor overruled the demurrer, and the defendant not answering over, entered decree in favor of the complainant for the amount reported by the master, with interest. The appeal is from this decree.

The complainant's right to recover against the defendant as part owner of the vessel for negligence or mismanagement of the property is the principal question here.

Part owners of ships, as to the conduct and the rights of co-owners, are deemed tenants in common of the property. One tenant in common of personal propetry cannot maintain an action against the other tenants in common except for the wilful destruction of the property or for a sale of the entire property without his consent, so that he is deprived of the entire property and of all control over it; (9

Wend., 338; 9 Cow., 230; 15 Pick., 71;) but as to the earnings of the entire property he may maintain his suit in equity for his share of the net profits, such profits belonging to the several owners as a partnership fund distributable according to the several interests.

"Part owners," says Story on Partnership, §449, "being tenants in common, one or more of them cannot maintain any action at the common law against the others for detaining, or even for forcibly carrying away the ship; but they may for the destruction of the ship; and, by parity of reasoning, probably for a sale of the entirety of the ship without their consent. The right, also, to an account of all the earnings and profits of the ship by all the part owners is clear and indisputable."

The ordinary remedy, he says, is by bill in equity in which all the owners should generally be made parties. If, however, there is an agreement between them by which one or more bind themselves to account to another for a separate share of the profits, such agreement may entitle him to maintain his action at law against the contracting party for his share, or to a bill in equity for an account of profits.

"The Roman law," he says further, §451, "seems to have gone a step further than perhaps has yet been distinctly recognized at the common law, and that is, by giving a complete remedy in taking an account and making an allowance for all losses occasioned by the fraud or negligence of one part owner to the others in the management of the common property. Probably our courts of equity would, in many cases, act upon the same just and enlarged policy; but it would not be easy to point out many instances of its actual exercise and application in practice."

Referring to the enumeration by *Pothier* of the duties and obligations of part owners to each other, among which are the duty of each to pay his share of the debts and charges contracted for the common concern, to account with

the other part owners for their shares of the common earnings and profits in his hands and to pay the debts due by him to them, as well as the damages sustained by them by his acts or negligences, Judge Story remarks: "But here again we must not assume, as a matter of course, that any one or more of the part owners is entitled, at the common law, to a compensation for losses sustained by the negligence or misconduct of the others in the management of the common property, where no *special agency* has been assumed, simply because the Roman law or the French law would seem, in like cases, to justify it; for the common law authorities have not as yet recognized any such general doctrine, and some of them may perhaps be thought to point to a different conclusion." (Ib. §452.)

Part owners or tenants in common cannot maintain suits against each other for the possession, or for their conduct in relation to the common property, because each part owner has the right of possession and may detain it as against the others, being liable only for actual profits, or for the wilful destruction, or the sale of the entire property. This is the doctrine of the common law which prevails here by express legislative recognition. Where one part owner of chattels is dissatisfied with the conduct of the other owner who has the possession or control of the property, as if he fails to employ it as to make a profit, we have been able to find no case where a court of law or equity has compelled the recusant possessor to make good the possible value of the use, or possible profits which might have been made if it had been profitably employed. The dissatisfied party is not without his remedy, for he may appeal to the courts for a partition or for a sale and distribution of the proceeds.

The same rule now prevails in this country in respect to ships. "What," says Judge Story, "it may be asked, is to be done in case of any dissent by one or more of the part

owners, not only as to the repairs, but as to the employment of the ship upon any projected voyage or adventure? Is the ship to remain idle and rot at the wharf? or, may the ship be equipped and employed so as to earn freight and subserve the general commercial policy of the country as well as the private interest of the other owners? The common law has here adopted and followed out the doctrines of the courts of Admiralty, founded upon the enlarged and equitable principles of maritime jurisprudence. It authorizes the majority in value or interest to employ the ship upon any probable design, and yet at the same time it takes care to secure the interest of the dissentient minority from being lost in any employment which he or they may disapprove." The majority may employ the ship as they choose upon giving security to restore the ship, or in case of loss to pay for the shares of the minority, in which case the minority bears no portion of the expenses and are not entitled to share in the profits. And the court of Admiralty may compel the giving of the security, and may compel the delivery of the ship to part owners who choose to employ her by those who refuse to employ her, whether the majority or the minority so refuse. (Story on Part., §428; Abbott on Shipping, Pt. 1, Ch. 3 §3.) It is incumbent on the minority to have recourse to such proceedings, as the best means of protecting their interests. For it has been decided that one part owner cannot recover damages against another, by an action at law, upon a charge of fraudulently and deceitfully sending the ship to foreign parts, where she was lost. (Sir T. Raymond, 15.) And it has also been decided in the Court of Chancery that one part owner cannot have redress in equity aginst another for the loss of a ship sent to sea without his assent. These decisions are consonant with the general rule of law that where one tenant in common does not destroy the common property, but only takes it out of the possession

of another and carries it away, no action lies against him. Abbott on Shipping, Ib., and see Collyer on Part., 3 Am. Ed., §§1205-1208; Steamboat Orleans vs. Phoebus, 11 Peters, 175; Horn vs. Gilpin, Amber, 255.

Part owners are not, at common law, liable to each other for injury or loss to their common property by negligence. The reason given is that each co-tenant may protect himself and need not leave the property in the uncontrolled possession of the other unless he choose to do so; and if he does so choose he must take the consequences. He has therefore no right of action if his co-tenant or part owner loses or injuries the property by his gross negligence, although he would have if the co-tenant had wilfully destroyed the property. 1 Parsons Mar. Law, Ch. 4, sec. 5; Anon., Skinner, 230; Strelly vs. Winson, 1 Vernon 197.

The case of Moody vs. Buck, (1 Sandf. S. C. R., 304,) was an action by one joint owner of a steamboat against another joint owner, who controlled and managed her, for the destruction of the joint property by the negligence of the latter. And the question was whether one joint owner or tenant in common of personal property could maintain an action against his co-tenant for negligence in the use of it. "The cases in which there was a recovery in favor of the joint owner, were all cases where there was an actual destruction of the property by the co-tenant, or a constructive destruction by his wilful act. The clear result of the authorities is that one joint owner of a ship or chattel is not responsible to the co-owners for the careless use of it. The others, if not satisfied to leave it in his care, must look themselves to the protection of their own property."

We must be excused for quoting to this extent from standard authors and decisions doctrines which are so familiar to the profession and which do not relate directly to the precise question raised by the demurrer in this case. But we think the bearing and result of the law we have

cited point inevitably to the proper solution of it. The demand is that a majority part owner must account to the other part owner for the possible earnings in addition to the actual earnings of a vessel which is in the possession of the majority owner, and which he refuses negligently or otherwise to employ in such manner as to earn more money than she does earn, or which he "ties up to the wall" and refuses to employ in any profitable enterprise. The authorities say he is not liable to the co-tenant for any conduct in the control and management of the ship, except for its wilful destruction or the actual sale of the cotenant's interest which is regarded as tantamount to a destruction.

If the part owner in possession is not so liable for neglecting to use or refusing to employ the vessel in any manner, it must be equally clear that he is not to be held liable for only employing her a portion of the time and refusing to employ her at other times when her actual employment might be profitable to all her owners.

We find no case where a recovery in such case has been allowed. On the contrary, we find the rule well defined in such cases, that where a part owner of a ship is dissatisfied with the management of the co-owner, he may have his remedy in the Admiralty Court by taking measures to employ the ship in a more profitable manner. And where there is such a disagreement between owners, or such conduct on the part of part owners that the profitable employment of the property is impeded, we think it the established rule in this country, as in France and Scotland, that the Court of Admiralty will order a sale of the ship. Story on Part., secs. 438-439, notes and cases cited.

But the counsel for the respondents here insists that the appellant, the three-fourths owner, having assumed the character of master as well as part owner of the vessel, has become the *agent* of each and all of the part owners; that this is a *"special agency,"* and that he became responsible

for his neglect like any other agent. It is doubtless the rule that upon any contract of agency the agent is understood to contract for reasonable skill and ordinary diligence, and he is consequently liable for injuries to his employer occasioned by the want of reasonable skill, and for ordinary negligence. By ordinary diligence we are to understand that degree of diligence which persons of common prudence are accustoned to use about their own business and affairs. See Story, Agency, sec. 183; Jones on Bailment, 5, 7, 121.

We do not understand that the defendant in this case entered into any contract of agency with the complainant for the management of the vessel. He assumed the position of master by virtue of his majority ownership, without objection, and solely because he was three-fourths owner. A special contract with the minority might have made him a special agent, but this contract does not appear to have been made.

The original bill charges that complainant "became the purchaser of the said one-fourth part of said schooner in the month of November, 1853, and that ever since that time the said defendant has had the command and entire control of the said schooner, receiving and disbursing her earnings without the slightest supervision on the part of your orator." The charge in the supplemental bill is that the said Philip A. Caro, "as master and part owner of the said schooner Powhatan, did not exercise due diligence, but was guilty of such gross neglect and mismanagement as to seriously damage your orator as one-fourth part owner."

There is no other charge or intimation in the entire bill as to the character or capacity of the defendant. He is charged as "master and part owner" with negligence and mismanagement whereby the complainant was seriously damaged. The bill does not sever the relation of "part owner" from that of "master," nor seek to charge any lia-

bility as master separate from that of part owner. In the case of Moody vs. Buck, (before cited from 1 Sandf.,) the action was by one joint owner against another who "controlled and managed" the boat. This seems to have been the position of the part owner and master here. In Lowthorp vs. Smith, (1 Haywood, 255,) the court holds that if one of two joint owners of a schooner *take possession* of the whole, "no action lies for this, for one hath as much right to the possession as the other, but if he destroy it," &c. The capacity of master, so far as it exists, is in virtue of the possession taken by him as part owner, and not by virtue of any contract whatever between the parties. The home of the schooner Powhatan was at Pensacola, where both parties also resided, as appears from the bill. The defendant Caro was in possession of the schooner from the time of Hyer's purchase in 1853 until the commencement of the suit in 1859, and yet there is no pretense that any remonstrance was made by Hyer in regard to the management by Caro as part owner and master, but Caro was permitted to manage the property in accordance with his own judgment under the eye, so to speak, of the complainant, who received dividends of the earnings from time to time, and yet during the five or six years he does not pretend that he complained of the negligence of which he must have been well aware during that period, if it existed, on the part of Caro as part owner or as master or both. If such negligence as resulted in damage to the complainant was attributable to Caro, in the meantime the complainant should have applied his remedy in the Court of Admiralty as we have already seen. It is not found in this case that the complainant treated with Caro as his agent, in virtue of his assumed capacity as master, but according to the original and amended bill he claims only to have had dealings and accountings of the earnings with Caro by virtue of the part ownership and defendant's control as a part owner.

We cannot conclude, therefore, that any such "special agency" existed on the part of the defendant toward the complainant as is contemplated by the law of agency, which holds an agent responsible for his want of diligence in the business of his principal.

The decree of the Circuit Court must be reversed and the cause remanded with direction to set aside the order and decree overruling the demurrer, and to enter judgment sustaining the demurrer, and dismissing the supplemental bill; that the exceptions to the master's report (except the 10th exception, which was abandoned,) be sustained; that the master's report be reformed and that such further proceedings be had in accordance with this opinion as may be agreeable to the practice of the court, and that the respondents, the executors of Henry Hyer, pay the costs of this appeal.

The preceding opinion was rendered at the June Term, A. D. 1877, and thereupon at the same term the respondents fled the following petition for a rehearing:

The petition of the respondents respectfully represents unto your Honors that by the judgment and opinion of your Honors rendered in the above stated case at the present term the decree stands reversed upon grounds not insisted upon by the defendant in the court below, and surrendered by the appellant in this court.

That in the argument of the demurrer to the supplemental bill in the court below, the defendant insisted, as the principal ground of demurrer, that the omission of the original bill could not properly be supplied by a supplemental bill, and did not urge that the supplemental bill failed to show such special agency as would render defendant liable for negligence; that on the argument in this

court the appellant's counsel (Mr. Maxwell,) expressly admitted that as master defendant was responbile.

The other counsel for appellant, Mr. Blount, alluded to the point only incidentally, where he claims that his capacity as part owner merged within itself his capacity as master; a fancy that is at once dispelled by the suggestion that a greater cannot be merged in the less.

It is a well recognized fact that the master of a vessel, by reason of being the agent of all the owners, possesses while he is master powers not possessed by any part owner as such; for a master, by virtue of his agency, can bind by his acts all the part owners, while a part owner can ordinarily bind only himself and his interest. The master could bottomry and otherwise create liens which would bind the interests of all the part owners. The part owner as such could bind his own interest only; that appellees from such admission had good cause to believe that it was unnecessary to urge before the court and to produce authorities to sustain the point that as a master drawing pay from all the part owners defendant was a special agent; that had not their attention been thus diverted from what seems the paramount point in the case, the appellees could, as they believe, have produced to the court reasons and authorities that would have satisfied the court that defendant as master was such special agent as was liable for gross negligence as charged in the bill and admitted by demurrer; that appellees believe they can sustain the proposition that no words in the English language so fully express the idea of a "special agency" as the words "master of vessel;" an agency of so high a character that throughout the world parties dealing with a vessel may deal with the master without inquiry as to the extent of his agency; that appellees believe they can sustain the proposition that Caro could not have been master, entitled to the monthly wages paid by all the part owners which

the record shows he was to receive, without "a special contract with the minority owner;" that the capacity of a master drawing his compensation from all the owners cannot exist "in virtue of a possession taken by him as part owner," but could only exist by virtue of some contract between the parties; they believe they can show a wide distinction between the *"control and management"* of a vessel by a part owner and the *"command and entire control"* of a vessel by a paid agent of all the owners; they believe they can show that defendant's dual capacity permits no defense except a denial to the charge of gross neglect in the management of the subject matter of his agency; that a Court of Admiralty could have given complaint no remedy against his master, and no other redress against his co-part owner than security for his share of the vessel.

In consideration of the premises, your petitioners pray that your Honors will permit your petitioners to be fully heard upon the point which seems not to have been relied upon by the appellant and consequently was, to a great extent, overlooked by appellees, but which proves to be the pivotal point of the case.

At the same term an order opening the judgment and granting a rehearing was made, and at the January Term, A. D. 1879, the case was reargued by Mr. Bount for the appellant and Mr. Perry for respondents, and at the June Term, 1879, the following opinion of the court was rendered:

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In the opinion delivered in this case upon the hearing, the court restricted itself principally to the consideration of the demurrer to the supplemental bill. Points are now made which render a consideration of the whole case, as

presented at the hearing upon the pleadings and pr
proper. These points relate to the doctrine of presu
tions as applied to judicial action, as well as the
which, it is insisted, prevails in this court in revie
conclusions of the Circuit Court upon matters of fact, w
all of the testimony used at the hearing in the Ci
Court is not before this court.

The first point made in the argument upon the rehe
is, that the presumption is "that every tribunal by w
a cause is tried has done what is right." It is then ins
that it is apparent from the record that the ship's b
which were in evidence in the Circuit Court, are not b
this court; that all of the testimony is not brought b
this court, and that the rule alluded to requires us to
effect to the decree upon the presumption that the t
mony omitted, with the testimony embraced in the re
justified the decree.

Several cases are cited to the effect that where a re
of all the evidence is to be had, and a part of it only
the record, the judgment must be affirmed, upon the
sumption that the missing evidence would sustain it. T
cases are actions at law, and are not precedents to co
us in disposing of this, a case in chancery.

Exidence taken during the progress of a trial at la
no part of a record, unless verified by the Judge in
form of a bill of exceptions, and no exception relatin
or arising out of the evidence can be heard in the cou
appeal, unless that evidence goes upon the record thr
this or some other method recognized and establishe
the practice prevailing in the court of original jurisdic
Under our usual practice, it cannot be said in a case w
there is no bill of exceptions that the evidence in a com
law case is a part of the record, and hence where the
no bill of exceptions there can be no certiorari upon
gestion in the diminution of the record to bring up the

dence. In cases in chancery, however, no bill of exceptions, according to our practice, is known. In such cases the evidence is a part of the record without this formality of verification by a bill of exceptions, and if any portion of the record is omitted and the appellee wishes it supplied, he must do so by a motion for a certiorari to bring up. Where the record in a common law case before this court discloses no bill of exceptions, then this court must treat what is before it as an entire record, and such action as that record discloses is presumed to be correct, so far as a consideration of the testimony is concerned. So, in the record of a chancery case, the evidence taken is presumed to be embraced in a record certified to be complete, because the testimony when taken and filed is *ipso facto* a part of the record. If there is anything in these books which is material, constituting, so far as they were used in testimony, a part of the record in this case, the appellees should have asked for a certiorari, (Rule 7 of this court.) or in the event it was deemed necessary that the originals should be inspected, a special order for their production, under the rules, should have been applied for.

In this connection we will remark that in cases involving matters of account and other cases where books are used before a master, it has not been the practice of this court any time to affirm a decree in their absence, upon the presumption that they contained evidence in addition to that reported by the master from which the decree is to be supported and affirmed. The decree is made with reference to the master's report. The evidence accompanying the report, duly verified, is as much a part of the record as the report itself, and if an omission appears on the face of the record, or is made known by affidavit, or the court deems it necessary that what is omitted should be before it, a certiorari is the remedy. In this case we cannot see any necessity for requiring such portion of these books as was

used in evidence to be certified to this court; nor do we see any necessity for an order directing the production of the originals. Appellees do not even allege that their presence is material to the questions involved in this case. Again, these questions were not raised in the argument of the rehearing, and are such as should have been raised before a hearing was had. The appellees cannot, as a matter of right after hearing, insist upon questions of a preliminary character not essentially affecting the merits of the case so far as the record discloses. Thus disposing of these questions, we reach the case presented by the record. What is that case? Plaintiff owns one-fourth, defendant three-fourths, of a schooner engaged in the coasting trade. He (the plaintiff,) became the purchaser of this interest in the month of November, A. D. 1853. As to the employment of the vessel, he admits in his bill that *"ever since that time* defendant has had the command and entire control of the schooner, receiving and disbursing her earnings without the slightest supervision on his part." Plaintiff claimed that sums were due him on account of profits, and prayed for an account of the same. There was no prayer for damages for neglect.

Defendant in his answer admits the interest of plaintiff, and states that ever since the plaintiff acquired his interest, he, the defendant, has been commander and master of said vessel, and has received and disbursed the earnings of the vessel without the supervision and control of the plaintiff. He affirms that he has accounted with plaintiff up to August, 1858; that upon a proper accounting, charging plaintiff with his share of the cost and repairs and equipment, plaintiff will be indebted to him. Defendant, as three fourths owner and master of the vessel, claims the right and privilege of using and controlling the ship, admitting plaintiff's right to security for his share and an account of the earnings. In reference to the employment of the

schooner, the defendant avers, "that the complainant, by his promises to this defendant shortly after they became owners of said vessel, caused him to abandon a regular and profitable trade, which he had secured for the same, and violating said pledges and promises, *caused this defendant to seek precarious employment for the said vessel, entirely dependent upon his own exertions and influence, and this defendant* has been compelled, for the purpose of procuring freights for the said vessel, to advance his own means and money to the amount of several thousand dollars every trip of the same, without the contribution on the part of the complainant of any, even the smallest portion of the same, though complainant has always been ready and has always received he had contributed to the said freights and earnings."

Upon the filing of replication, the chancellor made a decree, not only for an account of the actual earnings, but of such sums as the schooner "might have earned by the exercise of due diligence," the defendant to be allowed wages for himself and such of the crew as belonged to him, so as to show the net balance due complainant, according to the agreement of the parties or the custom of the port. The master was also directed to take testimony.

The master in his report charges the defendant with sums "which might have been earned if proper diligence had been used," being guided by the evidence as to the qualities and facilities of the vessel and the number of trips which she ought to have made during each year. There was evidence showing that more trips might have been made. There was no evidence of agreement between the parties. There was no evidence of any agreement between the parties to make any number of trips. The simple exercise of the powers of master is proved, nothing more. No claim having been made for damages for neglect in the bill, an allegation of gross negligence is made in a supple-

mental bill filed by consent. That allegation is that from "the 25th day of September, A. D. 1854, up to the time of taking said account, the said respondent, Philip A. Caro, as master and part owner of the said schooner Powhatan, did not exercise due diligence, but was guilty of such gross neglect and mismanagement as to seriously damage your orator as one-fourth part owner of said schooner." After demurrer to supplemental bill overruled, there was a hearing upon the bills original and suplemental, the answer and proofs and master's report. There were exceptions to the charges in the master's report wherein he gave damages for trips not made.

This is the case presented at the hearing.

The appeal here opens for consideration all prior interlocutory orders or decrees connected with the merits of the final decree. (2 Fla., 301-2; 4 Fla., 363; 9 Fla., 50.) A like rule prevails as to cases in equity instituted before the Code but heard and decided thereafter, which is this case. (15 Fla., 260; 14 Fla., 219.) Upon the hearing of the appeal in this case, this court has expressed an opinion that the demurrer to the supplemental bill should have been sustained, and the final decree, so far as it allowed damages for trips not made, was reversed.

We will review this record generally. The interlocutory decree in this case was clearly an error, in so far as it directed the master to state an account of sums "which the vessel might have earned by the exercise of due diligence." The case made by the bill was a case of alleged non-payment of plaintiff's share of actual profits, and the prayer was for an account of the "sums of money earned by said schooner." This decree was too broad and was error. Story's Eq. Pldg., sec. 257; 7 Wheat., 522; 11 Pet., 229; 1 Bro. C. C., 94; Fla., 567. Defendant's proper course was to appeal from this interlocutory decree. In the event of such an appeal, this court, had it deemed the allegations

sufficient to make a case, would have remanded the cause with leave to file a supplemental bill. (5 Fla., 567.) Such a bill, however, was filed (by consent), alleging gross negligence in management, and under this bill the evidence of a want of diligence in the use of the vessel was made available at the hearing. This cured the error so far as the want of proper pleading is concerned. The proofs in this case, considered in connection with the supplemental bill as filed, enable this court to pass upon the merits of the final decree. The decree made in this case embraces two classes of profits; first, profits earned by actual employment of the schooner; second, profits which might have been earned by more diligent employment.

Does this record make such a case against the defendant as renders him liable to the plaintiff for damages resulting to him by a failure of the defendant to make as many voyages as he might have made by diligence and industry?

Part owners of a ship are tenants in common of the ship, not partners; as to earnings, they are to be accounted for as between partners. There is some difference between the rules applicable to tenants in common of chattels in general and to part-owners of a vessel, arising from the interest which the public has in the employment of the vessel. One tenant in common of a chattel at common law has no method of dispossessing his co-tenant. All of the tenants are equally entitled to possession, and where one is in actual possession, he has a right to maintain it against the others, except in the case of severable chattels, as to which the rule in the United States permits a severance. Nor does the *mere possession* of it render him liable at common law to them for an injury done to it by him, short of the destruction of the property, or something equivalent to a conversion. It is stated by Littleton in his Tenures, that "if two be possessed of chattels personal in common by

divers titles, as of a horse, an ox, a cow, &c., if the one take the whole to himself out of the possession of the other, the other hath no other remedie but to take this from him who hath done to him the wrong, to occupie in common, &c., when he can see his time." The law did not regulate the enjoyment or the use of the chattel, but left it to the owners to be arranged by agreement, or if they would not agree, it was permitted to go to destruction.

In reference to ships, however, this rule as to personal chattels did not prevail. Being built "to plough the sea and not to lie by the walls," there are certain positive rules prescribed as to employment. Such rules are in the interest of the public, and to prevent idleness as the result of obstinacy. The employment of the ship is not like the employment of a horse or other chattel, considered a matter of private concern alone, but the State enables even minority part-owners to keep it employed against the wish of other part-owners not so desiring, its employment being considered a matter of public concern and interest. It is not necessary for us here to state the methods by which this employment is secured. It is certain that, as a means to enforce employment, a part-owner in possession is not held responsible to another part-owner for a want of industry in the management or employment of the chattel. This is a subject not of common law or equity jurisdiction, but belongs in general to the courts of admiralty. (27 Conn., 361.) The difference in the principles applicable to the matter of the employment of this chattel does not result from a desire of the sovereign to give the part-owner of a ship any greater rights as to its employment than exist as to any other chattel, or to give him rights of action resulting when exercised to his private benefit in the form of damages for non-user. The right is given as a means of public benefit and advantage, and that is given as the ground of difference by all the authorities upon the subject. "The

rights, remedies and liabilities of part-owners of ships among one another are in general identical with those of other tenants in common." In respect to torts, committed by some of the part-owners against the others, the law applicable to ordinary co-tenancy seems to control in all respects. One cannot maintain an action of replevin against the other to recover possession of any part of their common property. Neither can have trespass or trover, nor indeed any action against the other under circumstances which would not justify the maintenance of such action between other tenants in common. (4 East, 110, 121; 7 Com. B., 229; Mac. on Shipping, 92; 1 Rose, 447; 2 Ves. & B., 216; 1 Vern., 297; 8 Gill, 92.) Therefore, one part-owner of a ship "is not responsible to the co-owners for a careless use of it. The other owners, if not satisfied to leave it in his care, must look themselves to the protection of their own property. This rule has been applied even where a vessel took fire and was totally consumed by the carelessness and inattention of a part-owner in whose control it was. This rule of the common law is by Mr. Parsons considered as technical rather than just." Parsons on Shipping, 104; Fleming on Shipping, 399; Freeman on Co-tenancy, §385; Moody vs. Buck, 1 Sand., 304.

In general, it may be said that "a tenant in common is not liable for negligence or misuse of the common property, nor for what he might have made by diligence." (20 Barb., 448.) If in addition to the relation of tenant in common he is appointed bailiff, or by virtue of any contract or relation outside of and in addition to his relation of tenant in common, he assumes some other relation, which results in a legal duty to exercise diligence and ordinary industry and care in the use or employment of the common property, then, indeed, he may be held to the resulting legal obligation. This is all we understand Mr. Story to mean when he speaks with reference to a special agency

in this connection. These obligations follow, however, not from a simple employment or a non-employment or use of the chattel, but exist by virtue of the obligation assumed and entered into outside of and beyond the relation of co-tenant. This distinction is recognized and acted upon in the case of Jarvis vs. Noyes, 45 Maine, 110. In that case the defendant was part-owner of the vessel. It appeared that while he "had no written authority from his co-owners to act as agent of the vessel, he had always acted as such, had received her earnings, had paid some of her bills, (the master having also paid a part of them,) and had paid out at different times several sums of her earnings to the respective owners, and that the defendant had stated to the plaintiff that there was in his hands six hundred dollars of the earnings of the vessel belonging to the owners. Under this state of facts the court held that the defendant was liable as *receiver only* and not as *bailiff*, that is, for the amount he had actually received, and not the amount he might have received." In this case, the case of Sargent vs. Parsons, 12 Mass., 148, is cited as authority for the view that an appointment is essential to a liability as bailiff, that is, a liability for care, industry and proper management in the use of the chattel.

In the case reported in 12 Mass., 148, Parker, C. J. says: "The action of account is maintainable only against a bailiff, and a bailiff can only be one who is appointed such." This case, it is true, is between tenants in common of real estate, but it is applicable here in that it appears from it that where an obligation, resulting from a posession as bailiff is insisted upon, such a possession must be shown. It is unnecessary for us to repeat here the citations made in the opinion of the court. An examination of them will show clearly that independent of some relation of agency or contract, requiring industry in the employment of the ship, one tenant in common in possession is not

liable for neglect. A co-tenant of a chattel, or a part owner of a ship in possession and employing the chattel or ship, is not, by virtue of this possession or employment, liable in damages for a want of industry and skill in its management. Liability to account for earnings is the only result of such employment. A further liability for proper management, for the exercise of industry and diligence in the employment or use, can only result from a contract, express or implied, requiring the exercise of such diligence and industry; and it is necessary for a plaintiff not only to allege facts constituting such a relation, but when they are not admitted or are denied, to prove them. Has the plaintiff here alleged the existence of such a relation? In his original bill he states simply that the defendant was three-fourths owner of the schooner which was engaged in the coasting trade between New Orleans, Pensacola, and shipping points on the Black Water river, and that the defendant had the command and entire control, receiving and disbursing earnings, without the slightest supervision on the part of plaintiff. The allegation in the supplemental bill is "that Caro, as master and part owner of the schooner Powhatan, did not exercise due diligence," &c. There is here no allegation of a contribution by plaintiff to the outfit, to the repairs, or to the expenses of the vessel; no allegation of a contract by which Caro was to have control and management, no allegation that he was to receive payment for services in any capacity, and nothing from which it can possibly be contended that any contract in connection with Caro's possession is implied, except the statement that he was master and majority owner, modified by the admission that he had entire control in management as well as in disbursing the ship's earnings. Being majority owner in possession, Caro might have appointed a master, and if Caro's possession and exercise of control as master is to be referred to no contract with Hyer, and it should not be so

referred in the absence of some allegation either to that effect, or from which it must be implied, then there was no liability to Hyer other than such as results from possession and use by him, which is to account for the earnings.

The evidence in this record, so far as the relation of the parties is concerned, established that Caro was part owner and master, and nothing more. Defendant, in his answer, alleges that the complainant, by his promises shortly after they became owners of the vessel, caused him to abandon a reglular and profitable trade which he had secured; that, violating these pledges and promises, be caused this defendant to seek precarious employment for the said vessel, entirely dependent upon his own exertions and influence, and this defendant has been compelled, for the purpose of procuring freights for the said vessel, to advance his own means and money to the amount of several thousand dollars every trip of the same, without the contribution on the part of the complainant of any, even the smallest portion of the same, though complainant has ever been ready and has always received his portion of the earnings of the vessel equally, as though he had contributed to the said freight and earnings.

As to the matter of advances for freight, the testimony shows that some advances were made, but the master allows nothing, because, he says, the evidence is indefinite as to the number of times freight was so bought, and there was no proof that the freights were bought with defendant's private money. With a bill thus indefinite in its allegations as to the relations of the parties, and an answer thus definite and precise as to the nature of defendant's possession, how can we conclude that Caro's possession as part owner, or the exercise of the power of master is to be referred to some contract or agreement with Hyer. The answer sets up expressly that there was an employment contemplated by both parties, but that the plaintiff failing

to fulfill his pledges, he, defendant, sought employment for the vessel entirely dependent upon his own exertions and influence, and that he was compelled to advance his own money to secure freights.

In the nature of things, there can be but three classes of possession of a chattel by a tenant in common. One in reference to title. The seizin of one tenant in common is considered the seizin of all, and such presumed unity of possession is destroyed only by actual ouster, or proof of circumstances creating the presumption of ouster, or of facts showing clearly an adverse possession. Two, in reference to employment. First, a possession resulting from express agreement between the parties, or agreement implied from circumstances. Here an actual use, although by one, is still a common employment for a common benefit, if such is the contract, express or implied. Second, a possession not referable to any contract between the parties, a simple possession and use by one by virtue of his right to employ while he has possession. In each class of possession, when viewed in reference to employment, the tenant not in possession has, in the absence of an agreement to the contrary, a right to an account of the earnings. Hence an accounting, being common to each class of possession, when viewed in reference to employment, cannot be said to be evidence of one class rather than the other.

In view of the case made by the pleadings, the possession and employment of the schooner by Caro here was a simple possession and use by virtue of his right to employ while in his possession. But it is said that he was master, and that wages were allowed him in his account of disbursements. The bill makes no such case. The interlocutory decree directed such an allowance, and we presume it was made by the master. But, however this may be, the nature of the possession in this case, as we must hold it appears from the pleadings, is of such character that a sim-

ple allowance of wages as a proper disbursement in settlement between the parties will not justify us in holding that the relation of master is referable to some contract implied from that fact, rather than to the sole possession and control as part owner.

It was insisted in argument that Caro's relation to the ship was that of ship's husband. We do not deem it necessary to point out the difference between this relation and that occupied by defendant, further than to say that possession and employment as ship's husband belongs to the first class stated, which, in our judgment, is not the possession established here. On the contrary, the answer which would have been responsive to such an allegation, if made, sets up matters inconsistent with such relation, and the evidence does not establish such relation.

The judgment directed to be entered upon the first hearing will be entered as directed in the opinion of the court then delivered.

Ex-Parte J. C. H.

1. The sums which the Circuit Court is authorized to condemn a part[illegible] to pay in proceedings in bastardy towards the support of his chil[illegible] are not debts within the meaning of the organic limitation tha[illegible] "no person shall be imprisoned for debt except in case of frau[illegible]

2. The statute regulating this special proceeding authorizing the cou[illegible] to require the father to give bond for the payment of such sum[illegible] it is within the power of the court to direct the party to remain the custody of the sheriff, and to be imprisoned until compli[illegible] with its order.

3. Inability to obtain the bond, insolvency of the party, and other [illegible] circumstances not involving any question as to the power of [illegible]

ioner, who was held in custody by the sheriff
county, applied to one of the Justices of the
urt on the 27th day of June, A. D. 1879, for a
as corpus. The Justice issued the writ return-
the Supreme Court then in session. The sheriff
t he detained the petitioner under the following
ndered at the Spring Term, A. D. 1879, of the
rt for Wakulla county, in the case of the State
rel. F. H. vs. J. C. H.:

y came the parties in this case upone the issue
thereupon came a jury, to-wit: 1. Henry Bell;
ause; 3. W. K. Coleman; 4. J. W. Willis; 5
ter; 6. Wm. Spears; who, being duly sworn
to report the truth upon the issue joined, and
d the testimony, the argument of the counsel,
rge of the court, retired to their room to con-
erdict, and afterwards came into court and ren-
lowing verdict:

jury find for the plaintiff.

"H. C. BEVELL, *Foreman.*"

re, upon the finding of the issue for the plaintiff
, the court doth adjudge the said defendant
o be the father of the bastard child of the
mentioned in the pleadings in this case, and
ered by the court that the plaintiff do recover
dant the sum of five dollars for incidental ex-
ding the birth of the said child, and that the
recover the cost of the suit from the defendant,
on issue therefor; and it is further considered
t, that the defendant do pay into the registry
t the sum of thirty-five dollars yearly for the

space of ten years from this date, to be laid out and appropriated under the special order and direction of this court, from time to time to be made, toward the support and maintenance and education of the said bastard child, in equal quarter annual instalments, from the date of said judgment. And it is further ordered, that the defendant do enter into bond, with good and sufficient securities, payable to and to be approved by this court, for the due and faithful payment of the said sums annually as aforesaid, and that the defendant, upon failing to comply with the foregoing order, do stand committed."

The part of the statute regulating proceedings for the maintenance of bastards, which relates to the judgment to be entered in case the issue is found against the defendant, is as follows:

"If the issue be found against the defendant, or reputed father, then he shall be condemned, by the judgment of said court, to pay not exceeding fifty dollars, and all necessary incidental expenses attending the birth of said child, at the discretion of said court, yearly for ten years, towards the support, maintenance and education of said child, and the said reputed father shall give bond, with good and sufficient security, to be approved by the court, for the due and faithful payment of said sum of money, at times therein named, which shall be made payable to the said court, and laid out and appropriated under their special order and direction, from time to time made; which said bond shall be, and hereby is, declared to have the same force, validity and effect as a judgment of said court upon which execution may issue as often as money thereon shall become due and payable; provided, however, that if said child should not be born alive, or being born should die at any time, and that fact suggested upon the record of the Circuit Court, then, and from that time, the bond aforesaid shall be void."

Ex-parte J. C. H.

The Supreme Court fixed a day for hearing and ordered that notice thereof be given to the Attorney-General and to the person making the complaint before the Justice of the Peace.

R. C. Long for Petitioner.

1. The bastardy act attaches no penalty to failure of defendant to comply with order of court to execute bond for maintenance. (Thomp. Dig., 228.)

2. This action of Legislature based upon the fact that bastards are not, in Florida, a charge on the public, and there being no interest of the State to protect, her summary criminal process is only extended to plaintiff to secure her day in court, and procure her judgment at law.

3. Supreme Court have held bastardy to be a *quasi* criminal proceeding. (16 Fla., 554 & 830.)

If there is to be any *civil* feature admitted in the premises, it must apply to this very matter of the judgment, as up to that stage the proceedings have, in their nature, been of a criminal order. If the finding of the court means anything by *quasi* criminal, it must be this. There is no room for any other application of civil rule.

All authorities contemplating imprisonment of defendant for non-execution of bond, are adjudications upon statutes especially providing for that alternative. Even then the civil rule applicable to insolvent debtors is recognized, and a surrender of property, &c., releases defendant after a nominal confinement. See doctrine in Harris vs. Sulivan, 15 N. H., 81; Marston vs. Jenniss, 11 N. H., 156.

Query: Is there an implied authority vested in courts of law or chancery to enforce an order properly within their jurisdiction?

We fail to find an authority in point in response to inquiry of the court.

As a general proposition, within certain moral and polit-

ical restrictions, this doctrine may be true, but, 1st. the action of the court must be in enforcing compliance with an order clearly within their jurisdiction; 2d. From a recognized rule of propriety and public policy, this voluntary exercise of assumed power must be clearly for the ends of *justice* to *all* parties. Without judicial knowledge of a contemptuous spirit of disregard in defendant, and in the face of facts tending to show a moral impossibility of compliance, such arbitary exercise of oppressive power would be criminal and a most dangerous infringement of the rights and liberties of litigants.

The Attorney-General, (with whom was *F. T. Myers,*) for the State.

This is a *habeas corpus* for release from imprisonment under judgment in a bastardy proceeding. The statute relating to bastardy proceedings is found in Thompson's Digest, 228-9, and is discussed by the Supreme Court in John D. C. vs. Julia V. H., 16 Fla., 559.

The statute and judgment of the court are not in conflict with Section 15 of the Declaration of Rights. Paulk vs. State, 52 Ala., 427; Lower vs. Walleck, 25 Ind., 68; Ex-parte Teague, 41 Ind., 278; State ex rel. vs. Hamilton, 33 Ind., 502; Ex-parte Voltz, 37 Ind., 237, Masser vs. Stewart, 21 Ohio State, 353; People ex rel. vs. Cotton, 14 Ill., 414; Rich vs People, 66 Ill., 513; 2 Blackford, 307.

The court had power to render judgment of commitment in default of giving bond with security.

The statute authorizes the Justice of the Peace to issue process for the sheriff or constable to bring the defendant before him. From the arrest of the defendant under this process he is in custody of the court. If he gives bail, then, upon his appearance at the term of the Circuit Court, he is again in the custody of the court, (and to such custo-

dy the bail sureties could have surrendered him at any time.) From this custody and imprisonment he can alone relieve himself by complying with the judgment rendered under the statute, i. e. giving bond with sureties. If the court had merely directed that he give the bond with sureties, and said nothing about commitment, this would have left him in the custody of the court, and the officer would be bound to hold him until he had obtained his release by compliance with the statute. Any other construction operates as an annulment of the statute.

Again, the power to require the giving of the bond is given by the statute, and the question is the execution of this power. Has the court authority to resort to imprisonment to execute the power? If it has not, the statute is a failure and its purposes can be defeated by the mere recusance of the offender.

"Whenever a power is given by a statute, everything necessary to the effectual execution of the power is given by implication." Mitchel vs. Maxwell, 2 Fla., 594; State ex rel. vs. Gleason, 12 Fla., 209; Taylor vs. Moffatt, 2 Blackford, 307; 1 Brock., 159; 1 Kent, m. p. 464.

Mr. Justice Westcott delivered the opinion of the court.

The petitioner in this case alleges under oath an illegal restraint of his liberty by the sheriff of Wakulla county. The sheriff in return to the writ of *habeas corpus* issued, certifies that the petitioner is detained by virtue of a judgment of the Circuit Court, a certified copy of which accompanies his return. Upon this return the petitoner moves his discharge.

Upon an inspection of the judgment, of which a certified copy accompanies the return, it appears that the petitioner is held under an order of the Circuit Court for Wakulla

county directing the sheriff to detain him in custody until he gives the security which the court is authorized to require of him for the payment of sums of money which is has been by the court condemned to pay towards the support of a bastard child, under the provisions of the statute regulating the subject. (Thomp. Dig., 228, §3.)

No question is here made of the regularity of the proceedings under the bastardy act, so far as they concern the trial of the issues authorized to be raised under that act; nor is it questioned that the court is by that act authorized to require the bond. It is thus apparent that the general question here is, has the court the right and power to direct the imprisonment in this case until a compliance with its order to execute the bond, which by the law it is authorized to require the party to give.

Section 15 of the Declaration of Rights provides that "no person shall be imprisoned for debt except in case of fraud." This provision of the organic law is, as a matter of course, a limitation upon the powers of each department of the government, Executive, Legislative and Judicial. It is, however, the clear result of the authorities that the sums which the petitioner has here been condemned to pay under the bastardy act, are not debts within the meaning of the provision of the Constitution. 52 Ala., 527; 25 Ind., 68; 33 Ind., 502; 37 Ind., 237; 21 Ohio (State), 353; 4 Ill., 414; 66 Ill., 513. The true question here, therefore, is whether the Circuit Court, a court of general jurisdiction, having been given the express power to require such bond, and having by its judgment directed such bond to be given, has the authority and power to direct the party to remain in the custody of the sheriff and to be imprisoned until compliance with its order? While this is not the precise language of the order of the court, it is in contemplation of law its effect, as the discharge of the party would be his right in case of a compliance with the

order of the court. We cannot conceive that there is the least room for doubt upon this question. Without such power the order of the court would be nothing more than the act of an individual, so far as the matter of enforcing a compliance therewith is concerned. The order to execute the bond would be simply *"vox et praeterea nihil,"* and the order to imprison would be a mere *"brutem fulmen."*

From a grant of judicial power to make the order to do a specific act, results the power to enforce its performance by the usual method. *"Quando lex aliquid concedit concedere videtur et id, per quod devenitur ad illud."*

We do not propose to discuss the question at length. The following authorities sustain the general principle: 25 Ind., 74; 2 Blackf., 307; 2 Fla., 594; 2 Scam., 79-83; 1 Brock., 159; 1 Strob. (Law,) 555; 1 Rail., 606; 1 Virginia cases, 314; 1 Back. Abdg't Title N.

Disability to execute the bond, the insolvency of the party, and other like circumstances, are matters which we cannot take cognizance of in this proceeding. The order is within the power of the Circuit Court, and these matters, if their existence justifies any action, about which it is not here (in this collateral proceeding) proper for us to say anything, must be addressed to that tribunal.

The prisoner is remanded to the custody of the sheriff of Wakulla county, there to remain until discharged by due course of law.

JOHN C. GALLAHER, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. A new trial will be granted where mere hearsay and immaterial evidence was permitted to go to the jury under objection, when the court can see that such evidence tended seriously to prejudice the case of the defendant.

2. A bill of exceptions is a simple history of the case as tried, and should contain nothing more nor less than the facts as they appeared from the commencement of the trial until the final judgment. All objections, rulings of the court and exceptions thereto, should appear in the body of the bill in their proper appropriate place, and will not be considered if upon separate pieces of paper made and filed subsequent to verdict, or in cases of motion for new trial, or in arrest of judgment after the final judgment.

3. Where the record shows an indictment properly endorsed and filed, an arraignment, plea, trial and motion in arrest of judgment: *Held*, that it was too late, on a hearing in this court, for the first time to object that the record does not show that the grand jury presented to the court the indictment upon which the trial was held.

Writ of Error to the Circuit Court for Suwannee county.

The facts of the case are stated in the opinion of the court.

John A. Henderson for Plaintiff in Error.

The plaintiff in error was tried and convicted in the Circuit Court of Suwannee county at the Fall Term of 1878, upon a charge of bigamy. His motion for a new trial was overruled and he has brought his case upon writ of error to this court for review.

The asignment of error may be divided into two classes of error, and treated accordingly: the admission of evidence irrelevant and prejudicial to the case of the plaintiff in error, and error of law in the charge of the court.

Exceptions appear frequently to have been taken, though

it appears that the court justifies in one instance the admission of irrelevant and highly prejudicial as well as improper testimony, by certifying that the prisoner was understood by the court to favor the admission of the evidence while his counsel objected and took exceptions. Clearly the counsel should have the control of the case in the trial.

The first error assigned is well taken. The letters were wholly irrelevant to the issue, and were calculated to prejudice the prisoner with the jury and should not have been admitted.

The same is true of the 2nd, 3rd and 4th errors assigned. For the same reasons the evidence should have been excluded.

Having the record before it, and exceptions having been properly taken, the court will review the whole case. The doctrine laid down in civil cases is too stringent with respect to exceptions in criminal cases.

It was error at law to charge that under the circumstances there was not such an abandonment by the wife as would justify the second marriage, when the defendant had supposed her to be dead for three years then past. The home of the husband is the home of the wife. It is abandonment by the wife to refuse to live with the husband thereat. The court will only enquire as to the justification for not so living in divorce proceedings, not in collateral cases.

The abandonment was clearly proven, and the fact of the prisoner's hearing and believing his wife dead for the statutory period was clearly proven, and there was no evidence to the contrary. The verdict was against the evidence.

This record does not show that the grand jury presented to the court an indictment for the particular felony for which he was tried.

The statement of the defendant may be relied upon as

supporting the verdict, but this was forced from him by the letters and the evidence of the witness, Ambrister, improperly admitted.

Counsel refers to Laws of Florida, chap. 1637, art. 8 secs. 5 and 6; Whart. Am. C. Law, vol. 3, secs. 3089-90; Bishop on Marriage and Divorce, sec. 728-30; State vs. Collins, 13 Fla., p. 651; Gra. and Waterman on New Trials, vol. 1, p. 193, Com. vs. Thompson, 6 Allen, 591; Com. vs. Mash, 7 Metcalf, 472.

The Attorney-General for Defendant in Error.

The first error assigned is that the court in permitting the leters of Twiggs, to be found on pages 7 to 15 of the record, to be read in evidence.

The letters are irrelevant to the issue, except in so far as they relate to his marriage with Miss Ambrister. Whether the statements in these letters are such as were calculated to prejudice the jury, argument upon my part is unnecessary.

The following authorites bear upon the subject of granting new trials on the ground of admission of illegal testimony: Wharton's Am. C. L., vol. 3, secs. 3080-90; Lynes vs. State, 36 Miss., 617.

In so far as these letters relate to the first marriage, the fact is otherwise fully proved by the testimony of Ambrister, Tennessee marriage license and certificates and testimony of M. M. Blackburn and statement of Gallaher.

The Mississippi case cited above shows that a new trial should not be granted on account of the admission of illegal evidence to prove a fact which is fully established by other and legal evidence in the cause, it being clear that the verdict was not influenced thereby. Upon the point of the former marriage and the wife of that marriage being alive, we may, we think, assume that the verdict was not influ-

enced by the statements made in the letters as to such marriage.

In so far as these letters relate to *any other points than those of the first marriage and his wife being alive,* there is nothing in them that could have had any weight with the jury in influencing the verdict that is not fully supplied by Gallaher's statement. In other words, the statement made by Gallaher would clearly have produced of itself every conviction upon the minds of the jurors as to his guilt which the letters and the statement together would have produced.

But was the admission of these letters properly excepted to? On page 6 of the record it is stated that the *defendant's counsel* objected to their being introduced as evidence, but the court understanding the *defendant* to oppose the objection made by his attorney, permitted the letters to be read to the jury, and the *defendant's counsel* then and there excepted, and the exception was noted. On pages 44 and 45 of the record, it is, however, stated that when the defendant's counsel made this exception, the prisoner, as the court understood him, objected to the exclusion of this evidence, and the same not being urged thereafter the court did not rule on the subject, but the evidence was allowed to be stated to the jury. We contend that there was an abandonment of this exception. Coker and Scheiffer vs. Hayes, 16 Fla., 368; Story and Sullivan vs. State, Ib., 573; Bird vs. State, 14 Ga., 43.

The record does not show that the objection was ruled upon by the court and that the plaintiff then excepted. Pomeroy's Lessee vs. B'k. of Indiana, 1 Wall., 592; Laber vs. Cooper, 7 Wall., 570-1.

The second assignment of error is that the court erred in permitting a witness, Asa Ambrister, to give testimony as to the previous trial of the defendant at Sandersville, Ga., upon a charge of living with a woman not his wife.

The verdict in this case was rendered on December 11, 1878, (p. 41 of record.) The record does not show that there was any objection made to the introduction of this testimony *before it was admitted,* nor does it show that any ruling was made upon the point and an exception taken to the ruling. From the record it does not appear that the exception was thought of before the verdict had been rendered. The exception appears to have been made on 12th. (pp. 43-5 record.) Pomeroy's Lessee vs. Bank of Indiana, 1 Wall., 592; Coker and Scheiffer vs. Hays, 16 Fla., 369; Laber vs. Cooper, 7 Wall., 571.

The third asignment of error is that the court erred in permitting witness, (Ambrister,) to give evidence before the jury that the defendant had been mobbed at Sandersville, Ga., and protected by witness.

This assignment of error is subject to the objections made to the second, and, to a great extent, to that made to the first.

Defendant's statement covers the mobbing.

The fourth assignment of error is that the court erred in permitting any statement to be given by Ambrister other than that of his knowledge as to the first alleged marriage at the time the same was given.

The record does not show that any such exception was taken in the court below on the trial of the cause.

The fifth asignment of error is as to a particular part of the Judge's charge to the jury. The record does not show that any such exception was made on the trial. Story and Sullivan vs. State, 16 Fla., 555; Anderson vs. Hill, 12 S. and M., 679.

The record shows that the sixth assignment of error is based upon an exception to the charge not made until after verdict. Story and Sullivan vs. State, 16 Fla., 565; Anderson vs. Hill, 12 S. and M., 679.

As to the seventh assignment of error, in so far as it sets

up that the verdict was contrary to evidence, we respectfully submit that the testimony of the State was sufficient to justify it. The testimony of Ambrister, Blackburn and Clonts, including the marriage certificate, make out the case.

The jury were the judges of the credibility of the witnesses, and there is not enough in the testimony of Blackburn and Whitfield that was sufficient, even if credited, to overthrow the effect of the State's evidence and of the statement of Gallaher. They alone should say what weight should be given it. They have said this by their verdict. Miller vs. State, 15 Fla., 583.

In so far as this assignment relates to the argument of counsel, the record does not show what the arguments of counsel were. The court below is the proper judge and there is nothing here to show that any right has been abused.

Upon the eighth assignment of error, we assert that the point should have been made in the court below. It cannot be made here first. Francis vs. State, 6 Fla., 306; Townsend vs. State, 2 Blackford, 153.

We further insist that it is not necessary that there should be such a record. Mose vs. State, 35 Ala., 421.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an indictment found in pursuance of sections 4 and 5 of chapter 8 of "an act to provide for the punishment of crime and proceedings in criminal cases," approved August 6th, 1868, which sections read as follows:

"SECTION 4. Whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this state, shall (except in the cases mentioned in the following section,) be deemed guilty

of polygamy, and be punished by imprisonment in the State Penitentiary not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five hundred dollars.

"SEC. 5. The provisions of the preceding section shall not extend to any person whose husband or wife has been continually remaining beyond sea, or has voluntarily withdrawn from the other and remained absent for the space of three years together, the party marrying again not knowing the other to be living within that time, nor to any person legally divorced from the bands of matrimony, and not the guilty cause of such divorce."

The first assigned error is in permitting certain letters from H. D. D. Twiggs to Asa Ambrister, a witness for the prosecution, to be read in evidence to the jury.

Asa Ambrister was a witness for the State on the trial of the plaintiff in error. Among other things he testified, "I was present at the marriage of J. C. Gallaher, the defendant, to Mary A. Ambrister; I heard the ceremony performed, and defendant accepted her as his wife; they were married on the 23rd of October, 1851; I know the defendant; he is the same man; his wife has lived with me since 1863; the defendant was in the Confederate service, lost his arm at the seige of Vicksburg, returned to his family after the surrender of Vicksburg, and remained until the Federal army took possession of East Tennessee, which was but a short time. He returned in 1865 son after the final surrender; he had lost all and had no means and nothing to do; defendant said if he had some means, he would go where he could get business and provide a home for his family; his wife was willing, and I and my neighbor, Lenoir, endorsed his note in bank for some money and he went away; kept writing back from Alabama that he was unable to provide a home for his family for a year or more. Then he moved to Macon, Georgia, and continued the cor-

respondence until 1871, when I received a letter from one Judge Twiggs."

Here follows in the bill of exceptions a statement in these words, "which letter, with a number of other letters from Judge Twiggs to witness, was introduced as evidence, to which testimony defendant's counsel objected. The court understanding the defendant to oppose the objection made by his atorney, permitted the letters to be read to the jury, to which action of the court defendant's counsel then and there excepted, and the exception noted."

The first letter, which was then read in evidence to the jury, was as follows:

"SANDERSVILLE, WASHINGTON CO., GA.,
December 28, 1870.

"*Mr. Asa Ambrister*:

"MY DEAR SIRS I take the liberty to write you a few lines in order to obtain some definite information with regard to the circulation of various reports against the character of Maj. J. C. Gallaher, who resides in this place, and is engaged in the practice of law. This man has long since been regarded by the people of this place with distrust and suspicion," &c.

The remainder of the letter is filled with charges against the character of the defendant Gallaher, not properly admissible in evidence, and tending only to prejudice the mind of the jury against him.

Three other letters of the same character and equally objectionable, purporting to be written by H. D. D. Twiggs to the witness, Ambrister, were also read in evidence to the jury. There was no proof of the genuineness of either of the letters, had they not been otherwise objectionable, other than in the testimony of Ambrister above quoted. It is true, that after they were so read to the jury and on the commencement of his subsequent examina-

tion, he testified, "After receiving these letters, I consented to go to Sandersville as a witness against defendant."

This cannot be taken as sufficient proof of the letters, even if they were otherwise admissible, to warrant their introduction as evidence. But they were mere hearsay, irrelevant and immaterial to the issue, in no way tending to prove the first marriage of Gallaher, as is suggested on the part of defendant in error, or any other fact, but on the contrary, having the effect to prejudice the case of the prisoner with the jury. They were not even proven to be in the handwriting of Twiggs, who, it is claimed, wrote them.

In a subsequent part of the bill of exceptions is the following statement:

"STATE
VS.
GALLAHER.

"It is hereby noted that the prisoner's counsel objects to the introduction by the State of the evidence of Ambrister to the following effect, that he went to Sandersville, Geo., in 1871, as a witness for the prosecution against defendant, in a charge of living with a woman as his wife while his first wife was still living, and that the defendant was mobbed while there and shot, and that he, Ambrister, protected him and carried him in a hack to Macon, and that Judge Twiggs and others told him that defendant had been living in adultery with a woman in Sandersville and passed her off as his wife. Also, that defendant had borrowed money from him and not paid it back on his leaving Tennessee in 1865.

"It is also noted that defendant's counsel objected to the introduction of the letters of Judge Twiggs offered in evidence by the State, said letters being here noted as received in evidence, and that the defendant's counsel further prayed

that these exceptions be noted by the judge on the trial of cause.

"(Signed) WILKINSON CALL,
"For Prisoner.

"The above exceptions are hereby noted and allowed, but it is stated here on the record that when the defendant's counsel made the exception last stated, the prisoner, as the court understood him, objected to the exclusion of this evidence, and the same not being urged thereafter the court did not rule on the subject, but the evidence was allowed to be stated to the jury.

"WILKINSON CALL,
"For Prisoner.

"Exceptions noted and allowed Dec. 12, 1878.
"W. BRYSON, J. 3d J. C."

This paper, which seems to have been filed by the counsel for the prisoner, bears date on the 12th day of December, after the trial had been concluded on the 11th. If this was the only exception taken, under our previous decisions, referred to by the Attorney-General, it would not be available to reverse this judgment. This court has frequently held that exceptions, to be available on an appeal or writ of error, must be taken during the trial; to evidence, when offered; to the charge of the court, when made, and before the jury leave their seats to consider of their verdict. The bill of exceptions is a simple history of the case as tried, and should contain nothing more nor less than the facts as they appeared to the court and jury, from the commencement of the trial until the final judgment by the court. All objections, rulings by the court, and exceptions should appear in the body of the bill of exceptions in their proper and appropriate place, and will not be considered if upon separate pieces of paper filed subsequent to the verdict, or in cases of motion for new trial, or in arrest of judgment after final judgment. (Coker & Scheiffer vs. Hayes, 16

Fla., 368; Story & Sullivan vs. State, Ib., 573.) See Rule 103 of "Rules of Circuit Court in Common Law Actions," where a proper form for a bill of exceptions is given.

In this case, however, it appears that the introduction of these letters was objected to at the proper time, and the bill of exceptions shows that they were permitted to be read to the jury and that an exception was taken. It is true that the judge says that "understanding the defendant to oppose the objection made by his attorney, he permitted the letters to be read," at the same time and in the same sentence certifying "to which action of the court defendant's counsel then and there excepted, and the exception noted." This action of the defendant's counsel, who was conducting the case, negatives the idea that the objection was either waived or withdrawn. An exception was distinctly taken and placed on the record.

The second, third and fourth assignments of error relate to the evidence of Ambrister on the trial. There appears to have been no objection made or exception taken to the introduction of that evidence at the time it was offered, but on a subsequent day, after verdict, an exception was filed, by which it appears that the defendant's counsel first *objects* to such evidence. Under repeated decisons of this court, this objection and exception is entirely too late, and cannot be made available for the purpose of reversing this judgment.

The fifth and sixth assignments of error allege that the court erred in two specific propositions in his charge to the jury, but no exceptions were properly taken or noted.

The eighth error assigned is, that the record does not show that the grand jury presented to the court the indictment, or any indictment, for the offence with which the defendant was charged.

This error is here assigned for the first time in this case. No notice of it was taken in the court below. It was not

nade a ground in arrest of judgment, and does not appear ›y anything in the record to have been raised or consid-ered. The certified transcript of the indictment attached o the record is endorsed in due form, "State of Florida vs. [. C. Gallaher, Polygamy. A true bill, May 1, 1878. J. P. Morgan, foreman. Filed in office this the 1st day of May, A. D. 1878. Rob't A. Reid, Clerk of the C. C." The ›risoner was arraigned, plead not guilty, and was tried. Our court has held in a like case that it was too late to nake the objection for the first time here. Such must be ıeld to be the rule. (Francis vs. State, 6 Fla., 306; Moore vs. State, 35 Ala., 431.) See also Collins vs. State, 13 Fla., 651, where the question is fully discussed.

In view of the fact that the letters from Twiggs to Ambrister were improperly admitted and read in evidence, a new trial must be awarded.

WILLIAM HUMPHREYS, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

Where the offence is one created by statute, it must be charged in the indictment in the very language of the statute, or in language of equivalent import.

An indictment for an offence prescribed and defined by statute, must state all the facts and circumstances which constitute the offence, or the party indicted is not brought within the provisons of such statute.

Writ of Error to the Circuit Court for Alachua county.

The facts of the case are stated in the opinon of the Ct.

E. M. Cheney for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

The plaintiff in error, William Humphreys, having been challenged as not qualified to vote at the fall election of 1878, in Alachua county, and having, as is alleged, taken the oath prescribed by the statute, was indicted for false swearing, tried and convicted. The statute in relation to challenges and the oath of party challenged, approved on the 27th day of February, 1877, and being §7 of Chapter 3021, is as follows:

"If any person offering to vote shall be challenged as not qualified by an inspector or elector, one of the inspectors shall declare to the person challenged the qualifications of an elector. If such person shall claim that he is qualified and the challenge be not withdrawn, one of the inspectors shall administer to him the following oath. * * * If any person so challenged shall take such oath, his vote shall be received, provided, his name is on the registration list for such election district; and, provided further, that if he has been naturalized, or declared his intention to become a citizen of the United States, he shall present to the inspectors his certificate of naturalization, or a duly sealed and certified copy thereof, or a duly sealed and certified copy of his declaration of intention, as the case may be. Should the name of any person who has been duly registered according to the requirements of this act not appear on the registration list of the election district in which he resides, he shall, on offering to vote at the voting place or precinct in such election district, be required to state under oath that he is twenty-one years of age," &c.

The indictment, as presented by the grand jury, is in the following form.

"In the Circuit Court for the Fifth Judicial Circuit of the State of Florida for Alachua county, at the Fall Term thereof, in the year of our Lord one thousand eight hundred and seventy-eight.

"Alachua county, to-wit: The grand jurors of the State of Florida, inquiring in and for the body of the county of Alachua, on their oaths do present that William Humphreys, late of the county of Alachua aforesaid, in the circuit and State aforesaid, laborer, on the fifth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, with force and arms at and in the county of Alachua aforesaid, at a general election held in said Alachua county, in the State aforesaid, in election district number ten, in the town of Micanopy, did present himself as a duly qualified elector to the duly qualified and acting inspectors of said election, and that his right to vote at said election was then and there challenged and questioned. Whereupon, as is provided and authorized and required by the statute in such cases made and provided, the said William Humphreys was then and there duly, legally and solemnly sworn by one Daniel C. Hart, a duly appointed and qualified inspector of the election aforesaid, at said voting precinct or district, who was duly authorized and required by law to administer the oath provided for by the statute in such cases made and provided, and the said William Humphreys being so sworn as aforesaid, then and there upon his oath aforesaid, falsely, corruptly, knowingly, wilfully and maliciously before the said inspector of the election aforesaid, the said Daniel C. Hart, and did swear amongst other things in substance, and to the effect following, that is to say, that he, the said William Humphreys had lived and resided in the State of Florida twelve months, and in the said county of Alachua for six months,

next preceding said day, the fifth day of November, in the year aforesaid, whereas in truth and in fact the said William Humphreys had not lived or resided in the said county of Alachua for six months next preceding the said fifth day of November, in the year aforesaid, against the form of the statute in such case made and provided, to the evil example of all others in the like case offending and against the peace and dignity of the State of Florida."

A motion was made by the counsel for the prisoner to quash this indictment upon several specific grounds, which was denied by the court, and after verdict a like motion in arrest of judgment was also denied by the court, when the prisoner sued out his writ of error.

The errors assigned are as follows:

1. The court erred in overruling the motion in arrest of judgment, because, first, the indictment does not follow the words of the statute in this: it charges that Humphreys presented himself as a qualified voter, but it does not allege that he offered to vote.

2. The indictment does not show that one of the inspectors declared to Humphreys the qualifications of an elector before administering the oath.

3. The indictment does not charge any crime in the body of the same, nor in any concluding averment.

4. The indictment does not charge that the matter sworn to was material.

5. The indictment does not allege that the plaintiff in erorr knew or believed that the matters sworn to by him were false.

This indictment is clearly insufficient, and the motion made on behalf of the prisoner to quash it should have been granted. It nowhere alleges that the prisoner "offered to vote" previous to being challenged, or that he was challenged "as not qualified by an inspector or by any other elector," or that "one of the board declared to the person

challenged the qualification of an elector," or that the challenge was not subsequently withdrawn. This is an offence prescribed by statute, and the person committing it is made liable to punishment for "false swearing," and on conviction shall "suffer the pains and penalties of perjury." (Chap. 10, §1 of Chap. 1637, Laws of Florida, approved August 6, 1868.)

It has long been well settled that where the offence is one prescribed and defined by statute, it must be charged in the very language of the statute, or in language of equivalent import.

In the case of Morgan vs. The State, (13 Fla., 671,) this court says, "it is a general rule, that unless the words of the statute (creating an offence) be recited, neither the words 'contrary to the form of the statute,' nor any periphrase, intendment or conclusion, will make good an indictment which does not bring the fact prohibited or commanded, in doing or not doing, whereof the offence consists, within all the material words of the statute."

In Wharton's Crim. Law, (6th Ed., §364,) it is said, "where the words of the statute are descriptive of the offence, the indictment should follow the language, and expressly charge the described offence of the defendant, or it will be defective."

It is necessary that the defendant should be brought within all the material words of the statute, and nothing can be taken by intendment.

This indictment does not charge that the defendant offered to vote or presented himself for the purpose of voting, nor does it allege that he was challenged either by an "inspector or by any other elector," nor does it appear that he was informed by an inspector of elections of the necessary qualifications of a voter. These are the conditions precedent which render the oath necessary and material,

and it is only after an oath so taken, these conditions having been fully complied with, that the statute punishes "the false swearing" with the pains and penalties of perjury. The indictment does not state all the facts and circumstances which constitute the statute offence, and the party indicted is not brought within the provisions of the statute. "When the facts which the indictment charges may be true, yet the defendant not be prima facia guilty of crime, it is insufficient, for there still remains at least one thing of which he is not informed; and that he may know certainly what each thing is wherewith he is charged, all the facts which enter into his offence must, especially in felony, be set down by express averment, nothing being left to intendment. In other words, the indictment must allege everything which it is necessary for his conviction to prove against him." Bishop Crim. Prac., §519; Beasley vs. The State, 13 Ala., 535; Sarah vs. The State, 28 Miss., 267; Kit vs. The State, 11 Humph., 167; see also State vs. Pratt, 10 Lou. Ann., 191; Thompson vs. People, 3 Parker Crim. R., 208; The People vs. Allen, 5 Denio, 76; Com. vs. Hampton, 3 Grat., 590.

The cause in remanded to the Circuit Court with directions to arrest the judgment and discharge the defendant.

JAMES M. SNOWDEN, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. In an indictment for an offense created by statute, it is necessary that the defendant should be brought within all the material words of the statute, and nothing can be taken by intendment.

2. If the verdict of a jury in a criminal case is clearly against the law

and the evidence, the court should grant a new trial, but if the indictment is fatally defective, judgment should be arrested after verdict.

Writ of Error to the Circuit Court for Alachua county.

The facts of the case are stated in the opinion of the court.

E. M. Cheney for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

The indictment in this case charges that in August, 1878, Snowden then and there being a justice of the peace in and for the State of Florida and county of Alachua, did "impose a fine of twenty dollars upon one Henry Singleton, who was then and there arraigned before said J. Madison Snowden charged with an assault, which said fine was then and there paid to the said justice by the said Henry Singleton, and that the said J. Madison Snowden hsa not paid the said fine to the Treasurer of the county as he is required by law to do, and did then and there commit malpractice in office, and was guilty of conduct unbecoming the character of an upright magistrate, against the form of the statute," &c. A trial was had and the defendant found guilty; whereupon his counsel moved an arrest of judgment, for the reason that the allegations contained in the indictment did not show any offense to have been committed aginst the crimnal law of Florida. This motion was denied by the court. The counsel for the defendant then moved for a new trial upon the following grounds:

1st. The verdict was contrary to the evidence.

2d. The verdict was contrary to the law applicable to the case, and to the facts adduced by the evidence.

This motion was also denied by the court, exceptions were taken and the case comes here on writ of error.

The indictment was found under section 18 of chapter 5 of the article on crimes and misdemeanors, (Thomson Dig., p. 497,) which is as follows:

"If any justice of the peace shall be guilty of malpractice in office by using oppression, partiality or any other conduct unbecoming the character of an upright magistrate in the administration and under color of his office, he shall be indicted," &c.

Under the law, as determined at this term of this court in Humphreys vs. The State, the indictment is not good, inasmuch at it does not charge that the malpractice alleged was committed by the defendant "in the administration and under color of his office." Nothing can be taken by intendment. It was material and necessary to prove on the trial that it was by virtue of, and under color of his office as justice of the peace, that he imposed and collected the fine he is charged with having appropriated, and consequently it was necessary that such allegation, in conformity with the language of the statute, should have been made in the indictment.

But aside from this question arising upon the indictment, there is no proof to warrant the conviction of the defendant. The only witness called in relation to the trial, fine and payment of the fine to the defendant, for the misappropriation of which he was indicted, was Henry Singleton, the party from whom such fine was collected. He testified that he "heard defendant had issued a warrant against him; went to Archer; met defendant on the street and told him I would pay him what it cost. This occurred in summer of 1878, in Alachua county. *I was not tried, not convicted.* Mr. Snowden, the defendant, said he would let me off for twenty dollars, and I told T. A. Darby to pay it. I do not know that it, the twenty dollars, was a fine, nor if

any of it was a fine; it might have been; I don't know. I made this arrangement with Mr. Snowden on the street, not in any building. There was no jury, no trial, no conviction."

Mr. Darby testified that he paid the twenty dollars to Mr. Snowden.

This is all the evidence in regard to the arrest, trial and conviction of Singleton. There is no proof that a warrant was issued, that Singleton was arrested or tried, or that Snowden was acting in the administration of or under color of his office as justice of the peace.

The judgment must be arrested and the defendant discharged, for the reason that the indictment was defective.

L. G. DENNIS, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. A registered voter and qualified elector in this State does not, under the Constitution of this State, lose his political domicil by a living in Washington City attending to the duties of a public office at that point, his family being at the same time on a visit to his father in the State of Massachusetts.

2. When the verdict of a jury is contrary to and against the law and instructions of the court, as applied to the clearly established facts in a case, it should be set aside.

3. An indictment for a wilful and corrupt false swearing touching a party's qualifications as an elector, must set forth specifically the occasion of the administration of the oath. The general allegation, "being required by law to take an oath," is not sufficient in such case.

Writ of Error to the Circuit Court for Alachua county.

The plaintiff in error, Leonard G. Dennis, was indicted

at the Fall Term, A. D. 1878, of the Circuit Court for Alachua county. The indictment is as follows:

"In the name and by the authority of the State of Florida.

"In the Circuit Court of the Fifth Judical Circuit of the State of Florida for Alachua county, at the Fall Term thereof, in the year of our Lord one thousand eight hundred and seventy-eight.

"Alachua county, to-wit: The grand jurors of the State of Florida, inquiring in and for the body of the county of Alachua, upon their oaths do present that Leonard G. Dennis, late of the county of Alachua aforesaid, in the circuit and State aforesaid, laborer, on the nineteenth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, with force and arms, at and in the county of Alachua aforesaid, being required by law to take an oath touching his qualifications as an elector in said county of Alachua and State of Florida, before having his name enrolled as an elector on the registration books of said county of Alachua, was, on that day aforesaid, duly and solemnly sworn, and under oath interrogated by Aaron J. DaCosta, a deputy clerk, duly appointed and qualified by and to act for Julius A. Carlisle, the Clerk of the Circuit Court for Alachua county, and ex-officio registration officer of the election district number seven, in and for Alachua county and State of Florida, the said Aaron J. DaCosta being duly authorized to administer said oath, and Leonard G. Dennis being so sworn as aforesaid, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully and maliciously did swear, amongst other things, in substance and to the effect following, that is to say, that he, the said Leonard G. Dennis, had resided in the State of Florida one year and in the county or Alachua six months and in election district number seven of said county of Alachua and State of Florida, and in the town of Gaines-

ville, on Factory street, on block six of range six, next preceding said day, the ninetenth day of October, A. D. 1878, and that he was a qualified elector of said Alachua county and State of Florida, whereas, in truth and in fact, the said Leonard G. Dennis had not resided in the State of Florida for one year and in the county of Alachua for six months and in election district number seven, in said county of Alachua and State of Florida, and in the town of Gainesville, on Factory street, on block six and range six, next preceding the day and date aforesaid, and was not a qualified elector of the State of Florida and county of Alachua aforesaid, at the date aforesaid, against the form of the statute in such case made and provided, to the evil example of all others in the like case offending and against the peace and dignity of the State of Florida.

"WILLIAM A. HOCKER,

"State Att'y for the 5th Jud. Cir. of the State of Florida,

"Prosecuting for said State.

"Endorsed: In Circuit Court, Alachua county, Fall Term, 1878. The State of Florida vs. Leonard G. Dennis. False swearing. Indictment. State witnesses, A. J. DaCosta, R. F. Taylor, E. C. F. Sanchez, G. P. Webb, L. A. Barnes and S. H. Wingues. A true bill.

"GEORGE K. BROOME, *Foreman.*

"Filed in office this 28th November, A. D. 1878.

"J. A. CARLISLE, *Clerk.*"

Section 1 of Article 14 of the Constitution of 1868 provides as follows: "Every male person of twenty-one years and upwards, of whatever race, color, nationality or previous condition, who shall, at the time of offering to vote, be a citizen of the United States, or who shall have declared his intention to become such in conformity to the laws of the United States, and who shall have *resided and had his habitation, domicil, home and place of permanent abode* in Florida for one year and in the county for six months next

preceding the election at which he shall offer to vote, shall, in such county, be deemed a qualified elector at all elections under this Constitution."

Section 6 of the same article also provides that the Legislature should, at its first session, "provide by law for the registration by the Clerk of the Circuit Court of each county of all the legally qualified voters in such county," and "shall also provide that after the completion, from time to time, of such registration, no person not duly registered according to law shall be allowed to vote." Such legislation was duly made by the Legislature, and as a part of it the registration officer is authorized to require of the applicant an oath to the facts which constitute his qualification as a voter.

At the Fall Term of the Circuit Court, A. D. 1878, he was tried by a jury and convicted. A motion was made prior to the trial by the jury to quash the indictment, and after verdict motions in arrest of judgment and for a new trial were made, but they were overruled by the court and sentence pronounced. He sued out a writ of error to the Supreme Court, and assigns the following errors:

I. The court below erred in overruling the motion to quash the indictment:

1. Because the indictment does not charge the commission of any offence with sufficient certainty.

2. Because the appointment of Aaron J. DaCosta, as deputy clerk and registration officer for election district number seven, was contrary to law, and the said DaCosta was not an officer duly appointed and qualified according to law, or authorized to administer oaths to persons applying for registration.

3. Because it is not alleged and does not appear in the indictment that the matters alleged to have been sworn to by the plaintiff in error were material or necessary in

order to qaulify him as an elector under the law of this State.

4. Because it is not alleged in the indictment that the plaintiff in error knew or believed that the facts alleged to have been sworn to by him were false.

5. Because the indictment does not allege that the plaintiff in error was sworn and interrogated under oath by said DaCosta, in the election district number seven, in and for which district the said DaCosta is alleged to have been appointed and qualified to act as deputy clerk or registration officer.

6. Because the indictment does not allege the mode and authority of the appointment of the said Aaron J. DaCosta.

7. Because the indictment does not follow any statute, or charge any alleged offence in such manner, that the particular statute under which it is drawn can be identified.

II. The court below erred in admitting parol testimony to prove the appointment and qualification of Aaron J. DaCosta.

III. The court below erred in admitting the oral testimony of Aaron J. DaCosta to prove his own appointment and qualification.

IV. The court below erred in admitting testimony as to the appointment of Aaron J. DaCosta as general deputy clerk for Alachua county, when the indictment alleged that he was appointed for election district number seven.

V. The court below erred in overruling the motion for a new trial:

1. Because the verdict of the jury was contrary to the evidence.

2. Because the verdict of the jury was contrary to the charge of the court.

3. Because of newly discovered evidence.

4. Because incompetent evidence was admitted at the trial.

VI. The court below erred in overruling the motion in arrest of judgment.

1. Because the indictment does not charge any offence, and it does not appear from the verdict or from the record of what offence the plaintiff in error was found guilty.

2. Because it is alleged in the indictment that Aaron J. DaCosta was appointed by the Clerk of the Court for Alachua county as deputy clerk or registration officer for election district number seven, whereas the said clerk had no legal authority to appoint a deputy clerk or registration officer for said district number seven.

3. Because the indictment does not allege that the matters alleged to have been sworn to by the plaintiff in error were material to the issue or matter concerning which the plaintiff in error is alleged to have been interrogated.

4. Because the indictment does not allege that the oath alleged to have been taken by the plaintiff in error was known or believed by him to be false.

5. Because none of the several matters and things alleged to have been sworn to by the plaintiff in error are contained in any oath required by the Constitution or by law to be taken by persons applying for registration before having their names enrolled on the registration books.

6. Because of the general uncertainty and insufficiency of the indictment.

The other facts of the case are stated in the opinion of the court.

E. M. Cheney for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

In this case we consider first the motion for a new trial. One of the grounds for the motion for a new trial was that the verdict was contrary to law and the instructions of the court.

To this question we address ourselves. Leonard G. Dennis is here indicted for falsely, corruptly, knowingly and maliciously swearing that he had resided and had his habitation, domicil, home and place of permanent abode in Florida for one year, and in the county of Alachua for six months, next preceding the 19th day of October, A. D. 1878.

The defendant having plead not guilty to this indictment, it devolved upon the State to prove the alleged falsity of the oath of the defendant. In other words, to prove that he, Dennis, had not so resided, so had his habitation, &c., as sworn. We have examined and analyzed the evidence carefully. Stating it chronologically, it is substantially as follows:

Leonard G. Dennis came from Beverly, Massachusetts, to Alachua county, Florida, in the year 1866. After acquiring political rights in that county, he exercised the right of suffrage up to the year 1876. He was elected to the State Legisalture as a member of the Assembly for that year. He purchased a house and lot in Gainesville, the county site of Alachua county, and that his family resided in Alachua county during this time is not questioned. It was his habit to be absent from home a large part of his time, one witness says about half of the time. It was his habit to send his family North during the summer. In the summer of 1876 his family went North and had not returned up the time of the trial of this cause. Where they went, or where they are, or for what purpose they left,

is not disclosed, except so far as appears from the testimony of Barnes. He says he does not know where his (Dennis') family has been, but thinks they are *visiting* Dennis' father, at Beverly, Massachusetts.

In March, 1877, Dennis left Gainesville. He went to Washington City for Federal position; he obtained a position in the Treasury Department; between March, 1877, and March, 1878, he was employed in this office at Washington. The State's witness who testifies to these facts says that he met Dennis in Boston in the summer of 1877, and that he saw him also on a visit to Beverly, Massachusetts.

In the spring of 1877 he sold his house in Gainesville, retaining his furniture, which he placed in the care of a friend in Gainesville, with instructions to sell some of it and fix up a room for him with the remainder. To this friend's house his books, papers and library were carried, and there they remained. He occupied a room on this house upon his return to Gainesville. His house was for sale for a year or two before he sold it, because, as stated by the witness, it was too small for him. In 1877, three boxes marked "Mrs. Dennis, Beverly, Massachusetts," and weighing 428 pounds, were shipped from Gainesville by John W. Raymond. The house was sold to Sanchez, who took possession in May, 1877. The sale was negotiated by telegraph, Dennis being at the time in Washington City. Sanchez had a deed for the house written, describing Dennis as of Beverly, Massachusetts. He sent it to Washington to Dennis. Dennis sent it back declining to execute it because it described him as of Beverly, Massachusetts, instead of Alachua county, Florida. He (D.) sent back another deed describing himself as of Alachua county, Florida. Dennis took a mortgage on the house. In 1877 there was assessed against him a poll-tax, a tax on a lot in Gainesville, and a tax on a small amount of personal property.

The land was sold for taxes. In this year he sold two horses in Gainesville. He was in Gainesville in the spring and fall of 1878, in March, 1878, and in November, 1878. He remained in Gainesville for a month or six weeks in the spring of 1878. Barnes, the State's witness, who seems to be most reliably posted as to Dennis' affairs, testifies that Dennis would have returned earlier than the spring of 1878, but he (the witness) advised him not to come; that he remained awhile in Gainesville in the spring of 1878, and then went to Washington and came back again and remained about three weeks; that he then stated he had resigned his position in Washington. He next saw him in the fall of 1878.

Another witness for the State (Sanchez) says he was in Gainesville when the Congressional Investigating Committee was there, (no date stated,) and again in the spring of 1878. He was here last during Fall Term of 1878, and during Spring Term. He stayed here two or three months.

It appears that there were indictments against Dennis pending in the Circuit Court of Alachua county. One of the witnesses testifies that he still owns forty or eighty acres of land in Alachua county.

Thus stating the evidence, the next question is, was the verdict of guilty of false swearing contrary to the law of the case and the instructions of the court, within the meaning of the rule controlling the subject.

The determination of this question involves the definition of the terms "resided," "habitation," "domicile," "home and permanent place of abode," as used in article 14, sec. 1 of the Constitution. These terms are there used in reference to the qualifications of electors in each county "at all elections under the Constitution," and are to be defined with strict reference to the connection in which they stand, viz: the political domicile of the party.

Mr. Cooley, in his Constitutional Limitations, says, "the words 'inhabitant,' 'citizen' and 'resident,' as employed in different constitutions to define the qualifications of electors, mean substantially the same thing," and the cases cited to sustain this view contain expressions to that effect. In the State of New York in the case of Rosevelt vs. Kellogg, (20 John., 211,) the Supreme Court of that State remark, when speaking of the words resident and inhabitant, "that they signify the same thing." In a late case, however, in the same court, Frost vs. Brisbin, (19 Wend., 13,) Chief Justice Nelson, speaking for the court, says, "it may, I think, be doubted if this position is entirely accurate, as the latter term implies a more fixed and permanent abode than the former." In speaking of the word inhabitant, Lord Eldon, (10 Ves., 339,) says no word "is capable of a larger or more limited interpretation, and the construction is always to be made with reference *to the nature of the subject.*"

Under the Constitution of Massachusetts, operative in 1813, a party was given the right to vote if he was an inhabitant of the district. Chief Justice Parker, speaking for the court in a case (Patterson vs. Johnson, 10 Mass., 506,) where the question was whether a party was an inhabitant of one town or another in the State, makes a contrast between cases of this character involving political privileges and those arising under the pauper settlement cases in that State. In the case of Lincoln vs. Hapgood, (11 Mass., 352,) the same eminent jurist had occasion to determine what constituted an inhabitant. Lincoln had his home and most usual residence at Petersham. It was proved that for several years preceding, and also in the year when his right to vote was questioned, he had been absent several weeks at work at Belchertown, and in that year his absence had been for ten weeks up to a few days before the election, going away in February and returning in May. At an election in Belchertown in April of that year he had been

recognized as a voter by the selectmen of that town, and had actually voted in the election. As to this, Parker ,C. J. says: "He went to Belchertown for a specified and temporary purpose and had frequently done it before, always considering Petersham as his home and always returning there after a short absence." It was held that he was an inhabitant of Petersham. The matter of the vote was explained by the fact that it was at an election throughout the State, and the opinion of the elector was that it was only necessary to be entitled to vote at any place in the State to vote at the election.

In the case of Williams vs. Whiting *et al.*, the selectmen of the town of Dedham had rejected the vote of Williams, upon the ground that he had not resided in that town for the space of one year next preceding the 2nd of November, 1812. The facts were that on the 28th of November, A. D. 1811, he was a householder and had a family at Roxbury. On that day he came to Dedham for the purpose of performing the duties of Clerk of the Court. His family remained in Roxbury until the 12th November, when he removed his family to Dedham. During that time he passed his nights at Dedham. He was held to be a resident of Roxbury.

The case of Harvard College vs. Gere, (5 Pick., 374,) involved the question as to the effect of an actual residence in Washington City, engaged in the public duties of a United States Senator. The court held that he was still an inhabitant of the town where he resided when elected. In that case Chief Justice Parker says, "an inhabitant by our constitution and laws is one who, being a citizen, dwells or has his home in some particular town where he has municipal rights and duties and is subject to particular burdens; *and this habitancy may exist or continue notwithstanding an actual residence in another town or another county, provided the absence is not so long or of such a nature as to interrupt or de-*

stroy the municipal relation previously formed." In this case the alleged change was a change of local domicile or residence in counties in the same State, but the change here, if any, was a change of political domicile from one State to another. The rule is certainly not less strict in the latter case.

Under the laws of New Jersey in 1840, in order to constitute an elector it was required that a party should have *"resided in the county where he claims a vote for at least one year immediately preceding the election."* The Supreme Court of New Jersey in defining the term "resided" in this connection, says, (3 Harr., 144,) "the word residence (fixed residence I mean,) is generally used as tantamount to domicile." Thus in 1 Binn., 352, it is said that a domicile may be defined to be a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time. So Kent in his Commentaries, vol. 1, page 76, in treating of *national residence,* speaks of it as tantamount to national domicile, and Vattel has defined it the same way. Such domicile once obtained, remains to the possessor thereof notwithstanding occasional visits to foreign countries and until another domicile is acquired. This principle is applied to pauper cases and to questions of domestic settlement. The settlement or legal residence of a pauper is *prima facie* at the place of his birth, and this settlement continues until a new one is gained. There can be no suspension of it. I do not mean to say that the elective franchise of the citizen may not be suspended, for, pending the year's residence, by our statutes the fact is so, but I mean to say *that a residence in law* once obtained continues without interruption until a new one is gained." * * * * * "The place where a man is cormorant may perhaps be properly considered as *prima facie* the place of his legal residence; this presumption, however, may be easily overcome by proof of facts to the contrary. If a person leave

his original residence *animo non revertendi* and adopt another for a space of time, however brief, if it be done *animo manendi,* his first residence is lost. But if in leaving his original residence he does so *animo revertendi,* such original residence continues in law notwithstanding the temporary absence of himself and family. Such is the uniform language of the books, as well as the clear conclusion of common sense." This court in speaking of an actual residence in Washington by persons holding offices at that point, says: "Many of our Senators and Representatives in Congress habitually close their houses at home and move with their families to Washington during the winter. Some rent rooms, others rent houses, and they remain there sometimes two-thirds of the year without even a visit to their respective homes; and yet has any man ever supposed that in the eye of the law they were not residing in the State of New Jersey all that time." * * * "There is no distinction made by law in favor of those who are public officers and leave their residence to attend upon public business. It is all left to depend upon the same general principle *that a man's legal residence is not changed where he leaves it for temporary purposes and transient objects, meaning to return when these purposes are answered and objects attained.*"

Applying the rule deducible from these cases to the evidence here, it is clear that the State failed to prove, and that it did not appear from the evidence that the defendant had ever ceased to be an inhabitant or resident of Gainesville, or that he had charged his habitation, home and place of abode and domicile from Alachua county, Florida. From the evidence of the State, (the defendant having introduced no testimony,) it is clear that the legal domcicile, habitation, residence and home of the defendant was Alachua county, Florida. A person *actually living* for the time being in Washington City, as the defendant was here living, his family at the same time being shown to be vis-

iting his father in Massachusetts, is considered as residing and having a habitation and residence for political purposes, in other words, a political domicile, at their home and place from which he is temporarily absent. We have exhausted the material at our command and we cannot find a single case in the United States or elsewhere, where the common law prevails at all, applicable to the question of political domicile, any reasonable construction of which would sustain the conclusion that the legal residence or habitation, when viewed in reference to qualification to exercise the elective franchise, was not in this case Alachua county, Florida.

It is unnecessary here to insert at length the instructions of the court at the trial upon the subject. They are fair, impartial, and, as applicable to the case, correct. The verdict of the jury, therefore, in this case was plainly contrary to law and the instructions of the court, and should have been set aside and a new trial granted. Such would have been the law, even in a civil case. Nash vs. P. and G. R. R. Co., 12 Fla., 797.

We see no necessity for stating more than we have in reference to the motion for a new trial.

Thus disposing of the errors assigned as to the refusal to grant a new trial, we will examine the sufficiency of the indictment, a question which is presented by the motion in arrest of judgment.

This indictment is framed under and with reference to section 1 of sub-division 12 of chapter 1637, Laws of Florida. That section provides: "If any person shall be guilty of wilful and corrupt false swearing or affirming when interrogated as to his qualifications as an elector, or when his testimony may be required in any contested election, or shall wilfully and corruptly procure another person to swear or affirm falsely as aforesaid, he shall, on conviction, suffer the

pains and penalties of perjury." This is the same as the enactment anterior to the Code. Thomp. Dig., 80.

It is evident from the simple reading of this section that an indictment to be sufficient must allege in due and proper form a "wilful and corrupt false swearing or affirming." Under the criminal code of 1868 no penalty is fixed generally for a "wilful and *corrupt* false swearing."

From the manner in which the indictment is framed, it is apparently the view of the pleader that the false swearing here prohibited is such as is embraced in the general terms of section 2, sub-division 6 of the Code. The allegation in this indictment, in strict reference to the *occasion* of the oath, as distinct from its matter, is that L. G. Dennis, * * * being required by law to take an oath," and section 2 referred to above provides that "whoever being authorized or required by law to take an oath or affirmation, wilfuly swears falsely," &c. Now, if the "*wilful and corrupt* false swearing" intended by section 1 of sub-division 12 of the Code is the "wilful false swearing" mentioned in section 2, then the allegation "being required by law to take an oath," &c., is an allegation in the words of the statute so far as that language describes the occasion of the oath. If, however, there is a difference in *wilful* false swearing and *wilful* and *corrupt* false swearing, then the statute does not embrace "wilful and corrupt false swearing," and the rule as to the necessity for alleging the occasion of the oath and all other matters in connection with the crime, must be determined by reference to a correct definition of a "corrupt and false swearing," as used in section 1, sub-division 12, where no such precise crime is created by any other statute. Our inclination is to the view that the sufficiency of the indictment must be determined strictly with reference to the provisions of section 1, chapter 12 of the Code; but, however this may be, we are of the opinion that in either case a distinct allegation of the occasion of the oath

is necessary, and that in this case no such sufficient allegation is made.

There are two occasions under the statutes of this State upon which an oath touching a person's qualification as an elector may be taken. First, upon an application to register; second, in case of challenge upon an offer to vote. In either case the indictment should distinctly allege the occasion. This indictment alleges neither, nor does it allege interrogation as to qualifications, &c., in any judicial proceeding or course of justice.

The proceeding in which the State here assumes this oath was taken was an application by the defendant to have his name placed upon the register as a voter. Upon such application, if the officer deems an oath "necessary" the law authorizes him to require of the applicant an oath to the facts which constitute his qualifications as a voter. Referring to the indictment, and recollecting the distinction between the occasion of an oath and its subject-matter and the authority of the officer to administer it and its form, it is clear that the only statement of the occasion of the administering the oath in this indictment is, the "defendant being required by law to take an oath." This is insufficient.

Bishop, (2 Bish. C. P., 904,) treating of the crime of perjury, says the gist of the offence is the false testimony which the prisoner *as a witness* has given upon oath in some court of justice, and in stating things essential, which, by the common law should appear, he recites among others that "on such a day a controversy was pending before such a court." &c. In a case in Wisconsin involving this principle, (2 Wis., 441,) the Supreme Court of that State says, "it is essential that the indictment should show that legal proceedings were pending, or that the affidavit itself was the commencement of legal proceedings." In this case the judgment was arrested. In Regina vs. Bishop, (41

Eng. Com. Law, 169,) the indictment was for perjury committed in a proceeding under the English inter-pleader act, and it was not alleged that there had been an application for the obtaining of a rule according to the provisions of that act, without which it did not follow that the proceeding was of a judicial character, and because it was not alleged that *a rule had been obtained,* the indictment was held bad. See also the following English cases sustaining the same principle: 8 C. & P., 119; 8 C. & P., 787; 6 A. & E., 198; 1 Dew. & Ry., 10.

In speaking of necessary matters of fact to be alleged in an indictment for perjury, based upon a statute authorizing the oath upon a named occasion, the Supreme Court of the United States, (The United States vs. Nicholson, 17 How., 211,) mention the "description of the oath which was taken *and its occasion.*" The case of the Commonwealth vs. Hughes, (5 Allen, 501,) was an indictment under Chapter 163, section 2, of the general statutes of the State of Massachusetts, which is in words the same as sec. 2, sub. 6 of Chap. 1637, of the Laws of Florida, that is to say, "whoever being authorized or required by law," &c.

The defendant there moved in arrest of judgment upon the ground, among others, that the *occasion* of the administration of the oath was not set forth. The court considered the point and determined, as was very proper in that case, that the occasion was alleged.

The clear presumption from the manner in which the case is treated is that the court deemed this a fact necessary to be averred.

It is certainly unnecessary to say more in this connection. Those wishing to investigate the matter further will find the following cases as at least suggestive of the law upon the subject: 50 N. H., 249; 7 Mo., 300; 6 Yerg., 532; 12 Mass., 283; 26 Maine, 33.

It is apparent that to remand this case with directions

for a new trial would be to treat this indictment as sufficient, which it is not. The necessary order, therefore, is that the judgment is reversed; that the case be remanded with directions to enter an order arresting the judgment, and for such proceedings as are conformable to law.

MALCOLM L. BAKER, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. The constitutional provision relating to the exemption of a homestead to the head of a family residing in this State, providing that this "exemption shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption," is operative to secure to the heirs the benefits of the homestead exemption, nothwithstanding the deceased head of the family had not resorted to the statutory method of defining and placing on record the description of the property he intended should constitute his homestead.

2. The heirs of the deceased owner of land which was the homestead of himself and family, have the same right to claim and have set off to them as exempt from sale for the payment of debts the dwelling place and the quantity of land limited by the constitutional provision which was enjoyed by the ancestor as a home of himself and family in his life time. The constitutional provision is for the benefit of the family.

3. The homestead, whether defined and recorded under the statute, or set apart to the heirs after the death of the head of a family, is not assets in the hands of an executor or administrator.

4. Where one in good faith takes the property of another, honestly believing it to be his own, or that he has a right to its possession, he is exempt from the charge of larceny, there being no criminal intent.

5. The statute of 1877 (Chap. 2096) requires that when either party shall present to the judge written instructions on points or exceptions arising during the trial, praying that they be given to the jury, the judge shall declare to the jury "in writing his ruling

thereon as presented and pronounce the same to the jury as given or refused;" and the judge is also required to sign and seal such instructions as given or refused, and file the same in the case: *Held*, that a non-compliance with these statutory requirements was error.

Writ of error to the Circuit Court for Volusia county.

The facts of the case are stated in the opinion of the Court.

John W. Price for Plaintiff in Error.

The Attorney-General for Defendant in Error.

THE CHIEF JUSTICE delivered the opinion of the court.

Baker was indicted for the crime of larceny of five thousand oranges, of the value of sixty dollars, of the goods, chattels and property of William A. Cone, sheriff and ex-officio administrator of the estate of Philemon Whilite, deceased.

From the very inartificial manner in which the record is made up, it is somewhat difficult to ascertain what transpired at the trial. With some difficulty we have gathered from the record the following facts:

That Philemon Whilite died, leaving a widow and family residing on the land from which the oranges are supposed to have been stolen; that Cone is the acting administrator of the estate of the deceased; that this defendant resided on the place with the family and in charge of the place; that defendant claimed that the place was the homestead of the deceased in his lifetime, and of his family since his death, and that he gathered the oranges while so in charge; that he offered to prove these facts in order to show that the place and the oranges were not in the lawful custody, and therefore not of the goods and chattels of the administrator.

The court charged the jury that "you can take no notice of any rights accruing under the homestead or exemption laws of the State. There were no steps, according to the testimony, taken by the deceased parent to establish a homestead or to avail himself of the benefit of the exemption laws."

And further the court charged that "in a charge of larceny the belief that the accused has a right to the property of another is no excuse for taking it, unless the testimony shows some reason therefor."

I The Constitution of the State provides that a homestead to the extent of one hundred and sixty acres of land, * * * and the improvements on the real estate, shall be exempt from forced sale under any process of law, * * * except for taxes, purchase-money, improvements, or labor thereon; and that this exemption shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption. (Consti., Art. IX.)

According to the scope of the charge on this subject, although the deceased, who, in his lifetime, was the owner of land on which he resided with his family, might have claimed its exemption from sale for debts, yet if he was never threatened with an execution or other process for an indebtedness, and took no steps to protect his homestead from such process, the homestead might pass into the hands of an administrator as assets for the payment of debts, and then the family for whose protection the exemption was expressly provided might be stripped of all means of subsistence. We cannot assent to this construction of the language or the intent of the homestead provisions of the Constituion.

Any one who has owned and occupied with his family the limited amount of land and improvements mentioned has "enjoyed" it as exempt from forced sale, whether he has or has not been threatened with executions or other

process, because the enjoyment of a homestead consists in the use and occupation of it with his family, according to the clear intent and purpose of the provision.

There can be no doubt as to the correctness of this position.

The statute which makes real estate assets in the hands of an administrator for the payment of debts cannot, of course, refer to the homestead, because the constitutional provision exempting it from sale for ordinary debts, takes so much of the real estate out of the inventory of the *assets* and the administrator has no control of it. The heirs may demand the exemption, and what they claim to be the limits of the homestead, within the prescribed quantity, should be allowed and set apart as exempt from forced sale, because they are entitled to the same exemption as the ancestor had been.

That portion of the charge which instructed the jury to disregard "any rights accruing under the homestead or exemption laws of the State" was therefore erroneous.

II. As to that part of the charge that in an accusation of larceny, the belief of the accused that he has a right to property which really belongs to another, "is no excuse for taking it unless the testimony shows some reason therefor," the jury may have been led into error.

In Bishop's Cr. Law, Vol. 2, Sec. 851, the rule as collated from the best authorities is thus given: "In all cases where one in good faith takes another's property under claim of title in himself, he is exempt from the charge of larceny, however puerile or mistaken the claim may in fact be. And the same is true where the taking is on behalf of another believed to be the true owner. Still, if the claim is dishonest, a mere pretence, it will not protect the taker."

The gist of the offence is the intent to deprive another of his property in a chattel, either for gain or out of wantonness or malice to deprive another of his right in the thing

taken. This cannot be where the taker honestly believes the property is his own or that of another, and that he has a right to take possession of it for himself or for another for the protection of the latter.

III. A third error assigned is that the court did not sign and seal the special instructions asked for by counsel for defendant and give his views of the law thereon upon his refusal to give them.

It appears by the record that certain instructions were prayed in writing by defendant's counsel to be given to the jury, and the judge merely indorsed the instructions asked for, "instructions denied," without declaring to the jruy "in writing his ruling thereupon as presented and pronouncing the same to the jury as given or refused." This is required by the act of 1877, (Ch. 2096,) nor did the judge affix his seal to such indorsement of refusal as is required by the same act. These omissions are fatal errors, without reference to the merits of the instructions prayed for. The act is mandatory.

The judgment and sentence of the court are reversed and a new trial granted.

CASES ARGUED AND ADJUDGED

IN THE

Supreme Court of Florida,

DURING THE YEAR 1880.

REPORTED BY

GEORGE P. RANEY,

ATTORNEY-GENERAL.

VOLUME XVII—PART II.

TALLAHASSEE, FLA.

PRINTED AT THE FLORIDIAN BOOK AND JOB OFFICE.

1880.

JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. EDWIN M. RANDALL, Chief Justice.
HON. JAMES D. WESTCOTT, JR., } Associate Justices.
HON. R. B. VAN VALKENBURGH, }

ATTORNEY-GENERAL.

GEORGE P. RANEY.

CLERK SUPREME COURT.

CHARLES H. FOSTER.

JUDGES OF THE CIRCUIT COURTS.

FIRST CIRCUIT— HON. AUGUSTUS E. MAXWELL.
SECOND CIRCUIT— HON. DAVID S. WALKER.
THIRD CIRCUIT— HON. ENOCH J. VANN
FOURTH CIRCUIT— HON. ROBERT B. ARCHIBALD.
FIFTH CIRCUIT— HON. JAMES B. DAWKINS.
SIXTH CIRCUIT— HON. H. L. MITCHELL.
SEVENTH CIRCUIT—HON. WM. ARCHER COCKE.

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Wilson, *et al.*, v. Matheson, ... 6:
Wilson v. Russ and Merritt, ... 6:
Wilson, *et al.*, v. Sparkman, ... 8'

NOTE—The head notes in each case were prepared by the Jud who delivered the opinion.

DECISIONS

OF THE

Supreme Court of Florida.

JANUARY TERM, A. D. 1880

F. JONES CLERK AND EX-OFFICIO ASSESSOR OF TAXES, OF GADSDEN COUNTY, APPELLANT, VS. THE STATE OF FLORIDA, EX REL. BOARD OF PUBLIC INSTRUCTION, APPELLEES.

Construing section 1, of chapter 2030, laws of 1874, relating to the mode of determining the amount of money necessary to be raised by tax for county school purposes, in connection with section 1, chapter 3100, laws of 1879, it is held that the latter does not repeal the former, and that it is the duty of the County Commissioners to order the levy of the sum ascertained by the Board of Public Instruction, and duly certified by them in the manner provided by law to be necessary, not to exceed two and a half mills on the dollar of the assessed valuation.

The County Commissioners have no discretion to direct the collection by tax for school purposes of a less sum than that ascertained by the County Board of Public Instruction to be necessary for the support of the schools, if that sum is within the limit prescribed by law. The Board of Public Instruction are invested with the power to "ascertain and determine" the amount required. The act of 1879 authorizes the County Commissioners to *"ascertain* and *determine"* the amount necessary for general county purposes, and to *"levy"* the amount lawfully required for county school pur-

poses as determined and certified by the officers authorized to ascertain it under the act of 1874.

3. The Assessor cannot be required by mandamus to levy or compute the county school tax for the years 1879 and 1880, unless the same has been levied by the order of the County Commissioners.

Appeal from the Circuit Court for Leon County.

John W. Malone for Appellant.

White & Henderson for Appellees.

The facts of the case are stated in the opinion of the court.

THE CHIEF JUSTICE delivered the opinion of the court.

This is an appeal from the judgment of the Circuit Court for Leon county, awarding a mandamus to the respondent, commanding him to compute and levy upon the assessed valuation of property in said county for the year 1879 a certain sum for county school purposes, according to an itemized statement of the amount necessary to be raised for such purposes, delievered to respondent by the Board of Public Instruction of Gadsden county, which the respondent had refused to do.

Appellant contends that the writ was improperly issued, because he is not authorized by law to levy the county school tax upon receiving the statement of the Board of Public Instruction of the amount necessary to be raised or upon their requisition, but only upon the requisition of the Board of County Commissioners.

Relators insist that the County Commissioners have no power to determine the amount of county school tax to be raised, but that upon the determination of the Board of Instruction of the amount necessary to be raised, and the delivery of an official copy of an itemized statement thereof

to the Assessor, it is his duty to compute and enter the tax upon the assessment roll for collection without the order of the County Commissioners.

The Constitution, Art. XII., sec. 6, requires that "the Legislature shall authorize the several counties and incorporated towns in the State to impose taxes for county and corporation purposes, and for no other purpose."

Article VIII., sec. 2, declares that "it is the paramount duty of the State to make ample provision for the education of all the children residing in its borders." Sec. 3; "The Legislature shall provide a uniform system of common schools, and a university, and shall provide for the liberal maintenance of them." Sec. 8: "Each county shall be required to raise annually by tax, for the support of common schools therin, a sum not less than one-half of the amount apportioned to each county for that year from the income of the common school fund:"

The Legislature, in obedience to the requirements of the Constitution, has established a system of common schools, and has provided a Board of Public Instruction for each county, and has declared that each board is a body corporate, and has invested it with power to organize common schools, to hold and protect school property, to contract for and cause the erection of school houses, to employ teachers, and to determine the amount of money necessary to be raised by tax upon the property in the county, annually, for the support and maintenance of such schools.

A brief glance at the enactments on the subject will show the intention of the Legislature in respect to the question raised here.

The act of January, 1869, chapter 1686, sec. 19, par 15, required the Poard of Public Instruction to make out and lay before the County Commissioners an itemized estimate of expenditures to be incurred for educational purposes during the ensuing year, and the Commissioners were required

to cause such amounts to be collected, not exceeding one per cent. of the assessed valuation of taxable property.

The act of June, 1869, ch. 1713, provided, sec. 38, that the County Commissioners should ascertain and determine the amount of money to be raised for *county purposes*, which should not be more than fifty per cent. of the amount raised for State purposes. Sec. 30 provided that upon ascertaining the amounts to be raised for county, *school*, and State purposes, the Clerk should calculate and carry out the several amounts upon the assessment roll, and deliver the same with his warrant for collection. By section 42, Comptroller's warrants were made receivable for State taxes, county orders for county taxes, and *school orders for school taxes*. These were the first provisions made by law for these purposes. It will be observed that though the maintenance of schools by counties is a "county purpose" in a special sense, the law makes a distinction between county taxes raised for the ordinary purposes of paying the expenses of maintaining county government and county school taxes raised for supporting schools. They are deemed distinct funds for distinct objects. The next law was the act of January 27, 1871, chap. 1858. The fourth section provides that the Board of Public Instruction in each county shall, on or before the last Monday in May, prepare an itemized statement showing the amount of money required for the maintenance of the necessary common schools of the county for the ensuing year, and deliver an official copy of the same to the Clerk by the first Monday in June, which amount shall be not less than half the amount received from the State, nor more than one-half of one per cent. of the assessed valuation, and the *Clerk* shall compute, and the Collector collect the same. This, it will be seen, changed the law requiring the action of the County Commissioners in levying school taxes, and imposed the duty upon the Clerk.

The act of February 16, 1872, ch. 1882, sec. 1, par. 11, defining the duties of County Commissioners, requires them to *apportion and order the levy* of all county taxes in accordance with the law, either for specific or general purposes. This undoubtedly required that they should *order the levy* of school taxes.

The act of February 16, 1874, ch. 2030, sec. 1, p. 101, amending the above-mentioned sec. 4, act of 1871, re-enacts the provisions of said section 4 in all respects, except that it changes the time of preparing and delivering the itemized statement of school moneys required, and provides that the statement shall be delivered to the Assessor instead of the Clerk, and the Assessor is required to compute, and the Collector thereupon to collect the school tax.

The act of March 7, 1879, ch. 3099, sec. 37, again provides that orders upon the county treasury shall be receivable for "county taxes proper," and orders issued by the County Board of Public Instruction shall be received for "county school taxes," thus appropriately preserving the distinction between county taxes for general purposes and county school taxes.

The last act is that of March 8, 1879, chap. 3100, sec. 1. It provides that for the years 1879 and 1880, the "Board of County Commissioners, at the meeting for equalizing the county assessment, shall immediately thereafter ascertain and determine the amount of money to be raised by tax for *county purposes,* which shall not be more than two mills on the real and personal property of the county; * * * counties may also *levy* a tax of not more than two and a half mills on the dollar for *county school purposes.*" "Every such determination and levy so made shall be entered at large in the records of the Board of County Commissioners."

The foregoing are all the enactments we have found, or to which we have been referred by counsel, affecting the question.

The Board of Public Instruction of the county, as the law now stands, is invested with the entire care, management, and control of common schools and common school property; they are authorized and required to contract for the erection of school houses, and to contract with teachers employed in the shools. They are the only body or board in whom is vested these duties, and who can lawfully know and determine the amounts necessary to be raised by annual tax for the support of schools in the county.

The County Commissioners have charge of other affairs pertaining to the county government and county expenses.

There is no constitutional objection to the investment by the Legislature of these two branches of county affairs in these two boards.

The act of March 8, 1879, ch. 3100, gives to the County Commissioners the power to "ascertain and determine" the amount to be raised for "county purposes," and to *levy* a tax for "county school purposes" not more than two and a half mills on the dollar, while the law of 1874, ch. 2030, gives to the County Board of Public Instruction the power to ascertain and determine the amount necessary for school purposes, which shall not exceed one-half of one per cent.

The County Commissioners have no power to determine the amount of money *necessary* to be raised for county school taxes, but only for ordinary county purposes other than school taxes.

The act of 1879, ch. 3100, does not repeal, but qualifies the act of 1874, ch. 2030, in this, that school taxes for the years 1879 and 1880 must be levied by the order of the Board of County Commissioners at the amount ascertained by the Board of Instruction to be necessary for school purposes, not exceeding two and a half mills on the dollar. If the itemized statement given by the Board of Instruction to the assessor or to the board cantains items of expenses for school purposes only, and the amount does not exceed

the above limit of two and a half mils, the County Commissioners have no discretion, but must direct the amount to be collected for school purposes.

The act of 1874 authorized the assessor to compute the school tax from the statement, duly certified, of the school board. The act of 1879 requires the authorization by the County Commissioners to levy the school tax. The evident purpose of referring it to the County Commissioners was that the latter might know and enter of record the entire amount of taxes to be collected; that they might know that the itemized statement of the school board contained no items for other than school purposes, and that the amount did not exceed the lawful limit.

The result is that the respondent in this writ of mandamus cannot be required to enter the school tax for collection without the order of the County Commissioners, and the writ should go against them instead of the respondent, if the School Board have complied with the law in the matter and the commissioners have failed to levy the school tax as ascertained by the School Board.

The language of the act of 1879, ch. 3100, sec. 1, is that the Board of Commissioners, "*may* levy a tax of not more than two and a half mills on the dollar for school purposes."

According to the established rules for construing statutes this direction is mandatory. When a statute says a thing *may* be done, which is for the public benefit by public officers, it shall be construed that it *must* be done, (Dwarris on Statutes, 220 and notes.) Our Constitution is imperative in its direction that the common schools shall be maintained. The Legislature has provided the necessary machinery for carrying out this direction. If it be claimed that the commissioners may levy a tax or may omit to do it, in their discretion this claim cannot be allowed, because it would defeat the whole object of the Constitution and

the statute to give the commissioners the option to determine whether they would or would not maintain the public schools. The only discretion they have is to determine whether the money is required by the School Board for school purposes, and whether the sum required is within the limitation as to the rate of two and a half mills.

The judgment of the Circuit Court awarding the peremptory mandamus is reversed, with costs to be paid by relators.

THE STATE OF FLORIDA, EX REL THE BOARD OF PUBLIC INSTRUCTION OF GADSDEN COUNTY, VS. THE BOARD OF COUNTY COMMISSIONERS.

1. The "itemized estimate" of moneys required to be raised by county tax for school purposes, furnished by the Board of Public Instruction to the Board of County Commissioners, should contain not merely a statement of the whole amount of money necessary to be expended for the support of schools for the school year, but should also give the estimated income from the State school tax, State school fund and other probable sources, so that the County Commissioners may be informed of the amount required to be raised by county taxation.

2. The Board of Instruction having failed to give an estimate of sources of revenue, it is competent for the County Commissioners to ascertain the necessary data in order to learn the proper amount required to be raised by tax.

3. If the "itemized estimate" contains sums other than for the expenses of maintaining the schools, such items should be struck out by the County Commissioners.

4. Sums of money for "salary of County Superintendent of Schools," and for compensation of the County Treasurer as "Treasurer of the Board of Public Instruction," are not proper items of the expenses of maintaining common schools to be included in the itemized estimate of school expenditures.

5. The School Board of the county has no authority to pay the compensation of the County Superintendent or the County Treasurer; they are county officers, to be paid as other county officers, and not to be paid out of the school funds or school taxes.

6. Warrants outstanding, issued by the Board of Public Instruction during previous years, are receivable by law for school taxes levied by the County Commissioners; hence, in levying a sum necessary to be raised by tax, sufficient should be levied to liquidate such indebtedness so that the required amount shall be realized for maintaining the schools for the ensuing year.

7. A return by the County Commissioners to an alternative writ of mandamus requiring them to levy a sufficient amount of county school tax, that they have levied a tax which they believe to be sufficient, is not a good return unless they make it appear that they have levied the amount shown by the itemized estimate of the Board of Public Instruction, with proper deductions and corrections, to be actually necessary for the support of schools for the year.

An alternative writ of mandamus was issued out of this court setting forth that the Relators, the Board of Public Instruction, of Gadsden county, in June, 1879, prepared an itemized estimate of the amount of money required for the maintenance of the necessary common schools for the county of Gadsden, for the scholastic year commencing October 1, 1879, and that an official copy thereof was furnished to D. L. Kenan, the assessor of taxes for said county. By the first Monday of July, that said estimate was a reasonable and proper amount; that the County Superintendent, on the 24th September presented to the Board of County Commissioners an official copy of such itemized estimate for their consideration and action, and requested them to order a levy of two and a half mills on the dollar for the school purposes aforesaid. The aggregate valuation of taxable property in said county, as assessed for 1879, was $804.202. The "itemized estimate," (a copy of which is annexed to the petition,) is as follows:

"Itemized estimate of funds necessary for school opera-

"tions in Gadsden county, for the year beginning October
"1, 1879, and ending September 30, 1880.

"Money due teachers	$1,895.22
"For rent or construction of school-houses.....	15.00
"For repairs of school-houses	10.00
"For salary of Superintendent of Schools	500.00
"For compensation of Treas. of Board of P. I.	100.00
"For salary of teachers (then follows a list of schools in the county and the amount required for each,) aggregating for three months	2,376.00
Total	$4,896.22"

The Board of County Commissioners, it is alleged, refused to order such levy as requested, but in lieu thereof ordered a levy of one and a quarter mills on the dollar, which will yield but $1,005.25, being a sum entirely insufficient to maintain the schools for the year. That again, on the second day of February, 1880, the Superintendent of Schools, in a written communication to the Board of County Commissioners, then in session, again submitted to them an official copy of said itemized estimate, and requested them to order a levy of two and half mills on the dollar for said school purposes, which request the said board likewise disregarded, and refused, and then turned over the tax book to the collector, with the levy of but one and a quarter mills of county tax for school purposes.

And the relators being without other remedy, pray mandamus directing the said County Commissioners forthwith levy and assess a tax of two and one half mills on the dollar for the purposes aforesaid.

I. The respondents in their return deny that an official copy of the itemized estimate of moneys required for school purposes was presented to the Board of County Commissioners, or a quorum of them, in session, on the 24th September, 1879, or at any other time during that

year; and deny further that the itemized estimate was placed in the hands of the assessor as alleged, and that no such estimate was furnished to the clerk before the completion of the assessment book or at any other time, (the assessment rolls having been withdrawn from the assessor and placed in the hands of the clerk for completion.)

II. They further say that the Board of Public Instruction having failed to furnish them with an itemized statement of the amount required within the time and the manner prescribed by law, the respondents ascertained as best they could the amount necessary to be raised, and on the 24th September, 1879, ordered a levy of one and one-fourth mills on the dollar of assessed valuation, believing that would raise a sufficient amount for the maintenance of the public schools for the year.

III. They further say that a tax of one and one-quarter mills on the assessed valuation will yield the sum of $1,005.25

The one mill State tax will give 804.20

The income from the school fund 875.00

The license tax for sale of seed cotton 500.00

Making a total of $3,184.45

IV. The respondents further answering admit that on the second day of February, 1880, the County Superintendent submitted to them the itemized estimate, a copy of which is annexed, but that this was after the assessment of taxes was completed and the books ready to be placed in the hands of the collector, and they deny that the amount included in said estimate is exclusively necessary for the maintenance of schools, and the rent and repair of schoolhouses, but say that the item of $1,895.22 is the amount of outstanding warrants issued by the Board of Public Instruction, and is the accumulated growth of years of in-

debtedness and was not deemed by them a proper item to be considered in levying the school tax.

And they deny that the items in said itemized estimate for salary of Superintendent and County Treasurer should be paid out of school funds, and say they are not proper items to be included in the levy of county school taxes.

V. They deny that insufficient means have been provided for supporting the schools by reason of their action, but allege that they have provided ample means for paying the teachers for three months salaries required, and three of the schools contemplated in said estimate have never been established.

VI. They further say that before the service of the alternative writ, the tax rolls, with the taxes levied thereon, were in the hands of the collector and he had already collected a large amount of taxes.

VII. They deny that they were influenced by improper motives in refusing to levy a greater tax, and say that the tax levied, together with the amounts to be derived from other sources of income, will be ample to defray all legitimate expenses of maintaining the common schools for the year, and that in view of the storms and failure of crops for the present year, and the great expense to be met in repairing roads and bridges, they have simply desired to be as economical as possible without sacrificing public interests, and that they have not violated the law.

White & Henderson for the Relators.

John W. Malone and *Stephens & Love,* for Respondents.

THE CHIEF JUSTICE delivered the opinion of the court.

The relators move to quash each and every of the several paragraphs of the return to the alternative writ of mandamus, except so much thereof as takes issue upon the alle-

gations in the writ, to-wit: that the relators furnished to the assessor and to the County Commissioners the "itemized estimate" of moneys required to be raised by county tax for the support of the common schools for the current year, within the time required by law.

It is not found, upon examination of the remaining several paragraphs, taken separately or collectively, that the respondents show that they have directed the levy of a sum required to be raised by county tax sufficient to maintain the common schools of the county for the year, as shown by the itemized estimate made by the Board of Public Instruction and delivered to them before the tax rolls had been delivered to the collector. That the estimate was so delivered and brought to their attention, is expressly admitted in their return.

The relators give a copy of the itemized estimate furnished to the assessor and also to the respondents, as the relators allege, and the respondents also exhibit a copy of it, as furnished to them before the issuing of the tax roll and warrant for collection.

This itemized estimate reads thus:

"Itemized estimate of funds necessary for school operations in Gadsden county, for the year beginning October 1, 1879, and ending September 30, 1880.

"Money due teachers	$1,895.22
"For rent or construction of school-houses	15.00
"For repair of school-houses	10.00
"For salary of Superintendent of Schools	500.00
"For compensation of Treas. of Board of P. I.	100.00
"For salaries of teachers (3 months school in each locality) aggregating	2,376.00
Total	$4,896.22"

The form used purports to have been prepared by the State Superintendent. This estimate shows merely the es-

timated expenditures. The County Board of Instruction should give in their statement, for the information of the County Commissioners, an estimate of the revenue derivable from the income of the State School Fund, the State school tax, and any other sources, calculated upon the basis of the revenue of former years, and these items, deducted from the total estimated expenditures, will give proximately the amount required to be raised by county taxation for the support of schools. The County Commissioners, however, in this instance ascertained the amounts which they say are to be derived from the several sources, and until otherwise shown, we will assume their calculations to be correct. They say that the amount to be derived from the one mill State school tax will be $804.20; from the income of the school fund, $875; and from license taxes for the sale of seed cotton, $500; making $2,179.20. The residue of the amount required must be raised by a county tax, not to exceed two and one-half mills on the dollar of assessed valuation, as limited by the act of 1879. What is this residue?

The gross sum is estimated by the School Board at $4,-896.22. If there are any "items" in their estimate which are not proper items of expenses for maintaining the schools, it was proper for the County Commissioners to deduct them from the estimate. One of these items is for salary of County Superintendent, $500, and another is for the compensation of the Treasurer of the Board of Instruction. The County Commissioners very properly struck out these two items, as not being lawfully included in the estimate of expenses for maintaining the public schools, or to be paid out of the monies raised by tax for school purposes. The compensation of county officers should not be paid out of school funds. By the Constitution, the County Superintendent and County Treasurer are county officers, and their compensation, as regulated by law, should be paid

out of funds raised for the ordinary purposes of county government, in the same manner as other county charges are paid. The School Board has no lawful right to pay the salary or fees of county officers.

Each county is required by the Constitution to pay its own officers, under such regulations as may be prescribed by law. (Art. XVI., sec. 18.)

(Whether paragraph 12, sec. 19 of chap. 1686, laws of 1869, which authorized Boards of Public Instruction to fix the compensation of County Superintendents, is in conflict with sec. 27 of Art. IV., or with sec. 4 of Art. XVI. of the Constitution, is a question not involved in this case, and is therefore not considered.)

Chapter 2085, laws of 1877, makes the County Treasurer the "Treasurer of the School Funds," and his compensation is established by the provisions of chapter 1981, laws of 1874, which prohibit him from receiving any other fees or compensation than that allowed by this chapter, to-wit: a certain per cent. upon all monies received and all monies paid out. To pay him an extra amount as "Treasurer of the Board of Public Instruction" is not warranted by law, but is prohibited. In his settlement with the Board of County Commissioners, he will be paid the compensation as fixed by law, out of the proper funds of the county and not from school money.

Deducting from the estimate of the School Board the $600 named as salary and compensation of the superintendent and treasurer, leaves the sum of $4,296.22. It is claimed by the respondents that the sum of $1,895.22 is for the payment of past indebtedness of the School Board for hire of teachers and other expenses, represented by outstanding warrants issued by the board during previous years and remaining unpaid, and that because this is not for the expense of maintaining the schools for the current year, it should not be included in the estimate and collected

by tax for school purposes. By the revenue laws all school orders are receivable for county school taxes. This $1,-895.22 of school orders, being so receivable for the county schools taxes of the current year, will more than absorb the one and one-quarter mills which the Commissioners have provided, (amounting to only $1,005.25,) and thus instead of raising enough to pay the expenses of maintaining the schools there will be nothing but an old debt remaining, and the schools yet unprovided for. In other words, the sum which the Commissioners say has been raised for the future, will, according to law, be paid out on account of past due warrants, and the schools cannot, therefore, be maintained during the necessary period of three months of the current year.

In conducting State and municipal affairs, it frequently happens that from causes not anticipated a considerable amount of taxes or other revenue remains uncollected and sometimes not collectable, and this causes deficiencies in the funds to meet obligations incurred, for which warrants upon the treasury have been drawn. Upon the ascertainment of such deficiency, such warrants being receivable for taxes, unless provision is made for meeting it, the warrants already drawn will inevitably come into the treasury in the payment of taxes levied for the purpose of meeting future necessities, and thus leave the future unprovided for. This is a contingency not contemplated by the Legislature in respect to common schools. The law requires that a sufficient sum shall be raised to meet the expenses of maintaining the schools for the year, and this cannot be done unless the deficiencies are first provided for, so that the school revenues may be applied for the purposes contemplated by the law. In no other way can a sum sufficient to maintain the schools be realized.

It was, therefore, necessary either to abandon the schools for the year or to provide for maintaining them. The

Constitution, the Legislature, public policy, all require tha they shall be maintained.

Provision, therefore, for cancelling this indebtedness (i it be legitimate, which is not questioned here,) was neces sary, and it was proper to include it in ascertaining wha amount must be raised for maintaining the schools.

The sum of $4,296.22 being found as the sum require to meet past and present emergencies, is in part provide for, as it is now understood, as follows:

The one mill State tax yields	$804.2
Income of the State School Fund	875.0
Income from licensing sale of seed cotton	500.0
Thus estimating a revenue of	$2,179.2
The Commissioners have caused a levy to be made of one and one-quarter mills for school purposes, which will bring	1,005.2
Making in all	$3,184.4

being $1,111.77 less than the amount required, assumin that the foregoing estimates will be fully realized by th County Treasurer.

The motion to quash the return as insufficient is allowe except so much thereof as relates to the deduction of si hundred dollars from the itemized estimate of money re quired for school purposes, and so much thereof as relate to the deduction from the aggregate estimate of the rev nues reasonably expected to be derived from the othe sources mentioned in said return.

On the third day of April, 1880, the relators entered motion for a peremptory writ, and notice of such motio having been served on the respondents, and no objectio being made, an order was entered for the peremptory wr to issue returnable on the eighth day of April, and the wr issued accordingly. On the seventh day of April, the r

spondents moved the court to vacate the order allowing the peremptory writ, on the ground that it required the performance of an illegal act, and was improvidently granted, and on the next day the court granted the motion and quashed the writ, and on the same day the relators moved to amend the alternative writ by striking out such language as requires the Board of County Commissioners to "assess" the tax and the words "and to deliver the assessment roll to the Collector of Revenue for Gadsden county," and to insert in lieu of the last words stricken out, "and that they give notice of such levy to the Assessor of Gadsden county." The motion to amend was granted, and respondents thereupon filed their return to the alternative writ as amended, showing a substantial compliance with the mandate of the court, and relators not objecting, it was adjudged that respondents had substantially complied with such mandate, and that the respondents pay the costs, except those of the peremptory writ, the costs of which the relators were ordered to pay.

ADNAH C. CONN, APPELLANT, VS. E. CHADWICK & CO., APPELLEES.

The prejudice contemplated as a cause to disqualify a Justice of this Court from sitting in a case under the provisions of chapter 3120 of the laws of Florida, is a prejudice against a party to the cause, and an affidavit not setting up this fact specifically is insufficient.

Appeal from the Circuit Court for Escambia county.

Enoch Chadwick and George Hollingreen, partners under the style of E. Chadwick & Co., recovered a judgment against Adnah C. Conn in the court below; and Conn ap-

pealed to the Supreme Court. At the January Term, 1880, Richard L. Campbell, Esq., attorney for the appellant, filed in this court an affidavit, sworn to before the clerk, which after stating the title of the cause as above, is as follows:

"Richard L. Campbell, attorney and counsellor of said appellant, being duly sworn, says he has reason to believe, and does believe, that the said appellant cannot obtain justice in said cause by reason of the prejudice of the honorable Edwin M. Randall, Chief Justice of said court, and that of the honorable J. D. Westcott, Jr., Associate Justice thereof.

RICH'D. L. CAMPBELL,
Attorney and Counsellor for Appellant."

E. A. Perry for Appellees.

The attorney of appellant filed affidavit under chapter 3120, Laws of Florida, 1879, p. 61, and evidently seeks that two of the three Justices of this court should thereby be disqualified and debarred from hearing this case, and that two Circuit Judges should be called in by the remaining Justice, and if those two are objected to, that others be called in, until a court is formed which is entirely satisfactory to affiant.

Were we to admit the act of the Legislature to be constitutionally valid, the affidavit is clearly insufficient.

It does not set forth for or against whom or what the two Justices are prejudiced.

Whether against the party, the attorney, the case, or against some other person or thing.

If the court should hold the statute valid, they must so construe the act as to require the affidavit to show such facts as give ground for the alleged belief that appellant cannot obtain justice.

But, however full the affidavit may be made, neither the

appellant nor any of his attorneys can, under that statute, wipe out this court.

They cannot thus deprive two of its constitutionally appointed members of their right to hear and determine this appeal, or deprive the appellees of their right to have the appeal heard by the constitutionally appointed court.

If we admit that it is within the power of the Legislature to provide that the *fact* of prejudice of one or two Justices of this court—either against party or his attorney, or either of his attorneys, or against any thing else, whether connected with or entirely foreign to the case, disqualifies such Justice or Justices to sit in the cause, yet it clearly is not in the power of the Legislature to provide that an *ex-parte* affidavit *shall conclusively prove that fact.* Cooley's Con. Lim. (mar.) p. 368-9, and cases there cited.

"It is not competent for the legisltaive power to declare what shall be conclusive evidence of a fact." Wentlaw vs. White, 19 Ind., 470; Casbin vs. Hill, 21 Iowa, 70.

The Supreme Court of Alabama, in *ex-parte* Hickey, 52 Ala., 228, hold that the Legislature does not exercise judicial power in declaring what causes shall entitle a party to transfer a case from one court to another of co-ordinate jurisdiction, *provided it leaves the ascertainment of such cause for judicial determination.*

Here the existence of the *fact*—the ascertainment of the cause which is alleged to disqualify the members of the court—is left, not for judicial determination, but the Legislature attempts to cause it to be conclusively determined by the *ex-parte* affidavit of a party or his attorney.

The statute is also repugnant to section 4, Art. VI., of the Constitution, which requires that a majority of the three Justices shall act in the *transaction of all business.*

The Legislature here attempts to require one Justice to transact a most important business—the making up of a court—not only that he shall call in two Judges, but shall

continue to call in Judges until he makes a court satisfactory to affiant, and to any other attorney that may be employed in the case, or until the panel is exhausted.

Sec. 29, Art. VI., Constitution, does not authorize this act.

That only authorizes the Legislature to prescribe regulations for calling in "a Judge."

It does not authorize the Legislature to require that less than a quorum shall act.

Probably the Legislature might have required the Governor to call in Judges, but it cannot require less than a quorum of the Justices of this court to transact this business.

The act is void as against common right, common reason, and common sense.

It is void from uncertainty. No court can tell what prejudice the Legislature intended should disqualify a Justice.

No argument was made, nor brief submitted, for appellant.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

An affidavit is handed to the court, signed and sworn to by R. L. Campbell, Esq., attorney for the appellant, stating that "he has reason to believe and does believe that the said appellant cannot obtain justice in said cause by reason of the prejudice" of the Chief Justice and Mr. Justice Westcott of this court.

No motion was made thereon, and no explanation given of its contents or its purpose, until counsel for the appellees called attention to an act of the Legislature, chapter 3120, approved 8th March, 1879. This act provides that if any party to a suit pending in the Supreme Court, or his attorney, shall make an affidavit before the clerk of said court

he has reason to believe and does believe that he can-
obtain justice from one or two Judges of said court by
on of the prejudice of such Judge or Judges, then such
ge or Judges shall be disqualified to sit in said cause,"
the Judge not embraced in said affidavit shall call in
cuit Judges to sit in the place of the Judges so disquali-
.

Until now it has been, as I supposed, universally conceded
at the Constitution had vested the judicial power in the
urts. Now, it seems to be claimed that the Legislature
as the power to invest a party to a suit, or his attorney,
ith the judicial function to determine the disqualification
f the Justices.

In the case of the Trustees of the Internal Improvement Fund vs. Bailey, 10 Florida, this court denied the judicial power of the Legislature to prescribe what the judgment of the court should be upon the question of disqualification of one or more of its members, or upon other questions then and there presented in that cause. I think the present members of the court also are of the opinion that questions of law, arising from a statement of facts, are judicial questions, and their determination belongs to the judicial department.

The only facts stated in this affidavit are, first, that affiant has a reason for believing; and, second, that he does believe that the appellant cannot obtain justice by reason of the prejudice. What are the facts upon which the affiant renders this judicial opinion and judgment? He gives none; gives no information upon which the court or either of its members can act. He does not allege that either of the Justices is inompetent to sit in the cause, nor even that either of them has any prejudice. If it is desired that the court shall pass upon facts establishing disqualification, let them be stated. What is the character of the prejudice intended by the affiant to be shown? Is it a prejudice against

the party, or against the attorney, or against some other person, or a prejudice as to the law of the case, or as to the facts of the case; or a prejudice for or against other courts which may have decided this or other causes similar to this?

Unless the court is informed by some means of some fact upon which to determine something, it cannot be said that the intent of the statute has been complied with.

When facts are presented on oath to a court for its action, they should be stated in a manner so direct, positive, and unequivocal, that if they are untrue the affiant may be held accountable for swearing falsely, or, if true, they will justify the court in taking action.

The affidavit here presented is so vague and uncertain that no court or Judge can take action upon it. It simply states an opinion or conclusion of the affiant, based upon "reasons" concealed within his own breast, the nature and character of which reasons are not disclosed.

The question of the validity of the act of the Legislature, under which this affidavit is made, is not here presented or considered.

The affidavit is entirely insufficient to warrant any action to be taken by the court or any member of it.

No order can be made.

MR. JUSTICE WESTCOTT delivered the following opinion:

Chapter 3120, of the Laws of Florida, provides "that if any party to a case pending in the Supreme Court of this State, or his attorney and counsellor at law, shall make an affidavit before the Clerk of said court that he has reason to believe, and does believe, that he cannot obtain justice from one or two of the Judges of said court, by reason of the prejudice of such Judge or Judges, then such Judge or Judges shall be disqualified to sit in such case, and there-

upon the Judge or Judges not embraced in such affidavit shall call in one or two Circuit Judges, as the case may require, who, with said qualified Judge or Judges, shall constitute the court for the adjudication of such case; *provided*, that not more than two Judges of the Supreme Court shall be disqualified to sit in any one case under the provisions hereof." Another section authorizes either party, by a like affidavit, to challenge the Judges of the Circuit Court thus to be called in. The attorney of the appellant in this case files an affidavit framed under this law, and in conformity to its strict letter, alleging that he has reason to believe, and does believe, that he cannot obtain justice from Chief Justice Randall and Mr. Justice Westcott by reason of the prejudice of such Justices. This affidavit is made the basis of no motion. It is called to our attention by respondents' attorney. I will, however, treat the matter as if a motion to call in two Judges of the Circuit Court in lieu of the Justices mentioned had been made.

The respondents' attorney has discussed the questions arising upon this motion with reference to the powers of the Legislative and Judicial Departments of the Government under the Constitution, insisting that in several respects the statute is unconstitutional. These questions are very interesting. If, however, this matter can be disposed of without a decision of these questions, the rule is that they should be left undetermined here.

Says Chief Justice Marshall, speaking of such constitutional questions: "If they become indispensably necessary to the case the court must meet and decide them, but if the case may be determined on other points, a just respect for the Legislature requires that the obligation of its laws should not be unnecessarily or wantonly assailed." 2 Brock., 447; 6 N. Y., 177, 178; 4 Barb., 56; 29 Ala., 573; Cool. Con. Lim., 163.

The term "prejudice" used in this statute, accepting it

in each and every of its significations, is very comprehensive and varied in its character. One of its significations is prejudgment or prepossession, and it may be prejudgment or prepossession as to questions of law heretofore determined by the members of this court, in their judicial capacity. To give the word this meaning, in this statute, would be to unsettle the law in its length and breadth, so far as a change in the organization of the court in cases involving like principles to those involved and decided in antecedent causes could do so. Antecedent decisions involving an expression of opinion upon questions of law by the Justices of this Court would disqualify a majority of the court in all cases where they were applicable and were cited as precedents to control our action. *Stare decisis* is a principle of the most conservative and protective character. It is placed by the ablest jurists of England and America second only to the positive and fixed rules of property, and to those elementary principles which naturally affect the liberty of the citizen. All dispositions of property, whether they be of a testamentary character, or whether they arise in the active business conflicts of life, are made with reference to the then law, as determined and fixed by the decisions of the courts. The construction given to statutes and to the Constitution become, as it were, a part of the text of the statute or organic law. To give such a construction as this to this statute would be attributing upon our part to the legislative department of the government a recklessness and stupidity in its enactment disgraceful in its character, and immensely injurious in its results, as well as a thorough disregard for all the practices and precedents of the past. To the extent that a judge was learned in the law and was able to announce an opinion based upon his antecedent knowledge, to that extent would he be disqualified. Giving this signification, we would have as a legislative axiom—the greater the fool, the better the judge.

ase in which this motion is made may involve im- principles of commercial law heretofore determined court, and by the present justices thereof. To give ord the signification indicated, would disqualify all justices of this court, leaving it to the discretion of arty or his attorney to say which two of the justices is court should not sit in his case, forcing him at the time to take one of the disqualified justices and com- ng the other disqualified judge not only to hear the e, but to take part in its decision. Not only is this e, but while every substituted judge is subjected to at is practically and in effect a peremptory challenge of ke character, the remaining justice, though he may be isqualified in like manner, is made a fixture not subject to uch challenge by either party. That the Legislature did ontemplate that one prejudiced justice might take part in he decision of cases, is what that department of the overnment has plainly said in this statute. No rule of onstruction can do away with the clear, plainly expressed ntent of a statute in a case where that intent, however bsurd it may be, appears to be the primary purpose of the nactment. In such cases it ceases to be a question of con- truction. It becomes one of power alone.

We have as to this matter no general terms of varied ignifications, some absurd in their character, and others to ome extent reasonable and proper when viewed in reference o the harmonious action and mutual respect of the several epartments of government, as well as to the orderly ad- ninistration of justice, according to principles sanctioned y centuries of experience and practice; but it is a clear, lain, unmistakable announcement and direction by the egislature, that a party shall have his case tried by one f three disqualified judges, leaving that one to be deter- nined by the party, and when he has made his selection orcing th disqualified judge to organize his own court a

well as to participate in the decision of the case. In other words, prejudice under this statute can disqualify every justice and judge in the State except the one prejudiced judge whom one party may select, and he is beyond a challenge for prejudice by either party.

This, however, is not true of the word "prejudice" in this statute. This is a general term of many significations, indicating in some senses a mental condition or state, not highly censurable in its character.

The marked characteristics of one civilization or of one faith are classed as prejudices of that civilization by other and different civilizations and faiths, and this, too, independent of the abstract question of right and wrong. The education, the experience, the culture of the one people may condemn the opinions and mental state of another as prejudices, and yet in the abstract the error and the wrong, so far as it exists, may be that of the people who, assuming to themselves all the virtues known to the moral law, are yet in fact intolerant, intellectual bigots, measuring the length and breadth of their own mental and intellectual worth by leagues, and that of those of their equally deserving contemporaries by cubits. Most civilized nations have their national faith in the matter of religious opinion and practice. The people of one nation, devoted to one religious faith, give exclusive aid to organizations professing this faith through their law making power. Taking the liberal and tolerant views and acts of the fathers of the republic as the standard by which to judge of this action, it gave evidence of opinions in the matter of religious tolerance which resulted from undue attachment founded in education and culture. There are prejudices in favor of one's country or his church. In the view of those who criticise with severity, the civilization of my people and of my State, I, devoted to them and to her, am in a state of preju-

dice as to her and her institutions. I have, as to them, a previous bent or bias of mind in one way or another.

Leaving these general significations of the term "prejudice," I consider its various meanings as applied to legal proceedings. Prejudice in the sense of a previously formed opinion upon a question of law cannot certainly be what is here intended by the Legislature. If so, the extent of a judge's disqualification would be fixed by the amount of knowledge he has of questions of law, as they arise in the trial of a cause.

Again, of two attorneys engaged in a cause to-day, one may display a manifest ignorance of the Rules of Practice, and of the principles of law applicable to his case; another attorney on the opposite side to him in the cause may give evidence of accurate and extended knowledge in these respects. Tomorrow, upon the calling of another case in which these attorneys are engaged, the attorney least learned in his profession challenges two of the members of this court for prejudice, (leaving the third one with the same opinion out,) in that they enter upon the consideration of his client's cause with an unfavorable opinion as to his attainments, and are in a condition of mind which will prevent them from placing implicit confidence in his statements of facts, as well as from yielding their deliberate judgment of the law to the rule as he conceives it to be. Is this the prejudgment, the "prejudice" which the Legislature here intends?

Again, an attorney having a case upon our docket, may in the presence of the court be guilty of such manifest and gross contempt, as will justify and require his commitmen After his release, upon the calling of a case in which he engaged, he files an affidavit of prejudice, that prejud being the natural, necessary and properly unfavorable op ion which each member of the court may then entertain

to his antecedent conduct. Is this the prejudice which the Legislature here intends?

Again, an attorney honestly devoted to his causes, having every confidence in his own judgment and little in that of any body else, may lose one or more of them. Failing in these causes and believing in his own infallibility, he assails other decisions of the court through the press, and, not confining himself to simple, fair criticism, exhausts the vocabulary of epithets in his denunciations and discussions. Not content with this, he attributes motives of a most improper character to a judge, neither giving nor having any fact to give constituting a reasonable basis for his charge. Is the legitimate, necessary, and proper opinion which the judge, who knows no such motive prompted his action, must entertain of such conduct the prejudice which the Legislature here intends?

From what has been said, it must be evident that to give to the term "prejudice" in this statute the significations mentioned, would lead to consequences of the most absurd character. In such cases the court, to avoid such conclusion, must "presume that some exception or qualification was intended by the Legislature." 3 Mass., 539; 24 Pick., 370; Potter's Dwar. on Stat., 202, note 19, 215; 22 Pick., 573; 12 Fla., 589. "The consequences are to be considered, for the courts will not construe acts of parliament so as to admit of any absurd consequences." In this statute this word is general and has many varied significations, some of which, if given, would result in such plain absurdity and mischief that we must resort to interpolation in order to avoid attributing to the Legislature such absurd intention.

In the time of Bracton and Fleta, a Judge might be refused for good cause, but at the common law, as administered in England and the United States for centuries, Judges and Justices could not be challenged. There were disquali-

fying causes, such as interest, and being of kin to the party. In respect to jurors all challenges for favor were to be determined by his affidavit to its truth, much less to his simwhere a party was required to allege a cause for challenge, was the question of the existence of the cause left to be determined by his affidavit to its truth, muhc less to his simple affidavit to his belief in its truth.

In all cases where a statute provides, in general terms, for the disqualification of a Judge for prejudice, it has been construed to mean prejudice against the party to the suit, and in every case the courts have not hesitated to give a reasonable construction to enactments of this character.

In construing such a statute, and the general provision of the Constitution of Kentucky upon a like subject, the Court of Appeals of that State say, (2 Met., 629,) "the Legislature certainly did not intend that any cause, however trivial or unimportant, should operate to disqualify a Circuit Judge, or render it improper that he should preside in a case; but obviously meant that such cause should be a legal and substantial one." The Constitution of that State provided that "the General Assembly shall provide, by law, for holding Circuit Courts, when, from any cause, the Judge shall fail to attend, or, if in attendance, cannot properly preside." One of the questions in the case was whether what constituted such legal and substantial cause was to be tested by the common law or by the statutes of the State in force when the Constitution was adopted. The court held that under this peculiar Constitution the statutory disqualifying causes were perpetuated. At the time of the adoption of this Constitution, a statute of that State provided that all suits cognizable in any of the courts of the Commonwealth, where either of the parties shall conceive that he, she, or they will not receive a fair trial in the court where such suit is depending, owing to the interest or prejudice of any Judge, that he or she will not receive just

in the court then sustaining the said suit, to petition a Circuit Judge for a change of venue, &c. The courts of that State construed the word "prejudice," although it was of a general nature, and was used without restriction, as in our statute, to be a prejudice against the party. This I conceive was the intent of the Legislature in this statute. The affidavit filed in this case is general, and for aught that appears or is sworn to, the prejudice here intended may be the prejudgment, the prepossession of opinion which we entertain as to questions of law therein involved, resulting from investigation and decisions in antecedent causes before this court. The intent of the Legislature being determined to be a prejudice against the party, it is within our power (sec. 12, ch. 1938, laws,) and it is our plain duty to require the affidavit authorized to be filed by this statute to state the fact that the prejudice is a prejudice against the party. In this view the affidavit here filed is insufficient, and any motion to make it the basis of action looking to the calling in of Judges of the Circuit Court must, in my opinion, be denied.

WILLIAM A. C. BENBOW, PLAINTIFF IN ERROR, VS. MARQUIS & CO., DEFENDANTS IN ERROR.

It is error to submit an issue upon one plea to the jury while other pleas remain undisposed of, when it appears that they were not abandoned.

Writ of error to the Circuit Court for Santa Rosa county.

The judgment in favor of the defendants in error, George Marquis and Frederick Fisher, partners under the style of Marquis & Co., was rendered April 3, 1879. The appeal

taken therefrom by Benbow having been dismissed (*ante* page, 236,) at the June Term, 1879, he at the same term sued out a writ of error, returnable to the present term. The other facts of the case are stated in the opinion of the court.

Geo. P. Raney for Plaintiff in Error.

No counsel *contra.*

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This was an action of replevin brought by the defendants in error against the plaintiffs in error in the Circuit Court of the State of Florida for the First Judicial Circuit in the county of Santa Rosa to recover three hundred and ninety-eight pine saw-logs, which defendant, as Sheriff and ex officio timber agent, had seized.

The defendant pleaded, first, the general issue not guilty; second, that the timber and logs described in the declaration are not, and were not at the time of the said alleged taking, the property of the plaintiffs; third, that the said plaintiffs are not and were not lawfully entitled to the possession of said property in the declaration mentioned at the time of the replevin of the same by the said plaintiffs; fourth, that the said property in the declaration mentioned at the time of the alleged seizure thereof by the defendant was the property of the State of Florida, and the said logs and timber had been cut on the public lands of the State, and that at the time of the said alleged seizure the defendant was the Sheriff of the State of Florida for the county of Santa Rosa, and, *ex-officio*, the timber agant of the State for the said county of Santa Rosa, and that, as such timber agent, he seized three hundred and ninety-four logs of pine timber as the property of the State, as he was by law re-

quired to do. The second, third, and fourth pleas concluded with a verification.

There was no replication to the second, third, and fourth pleas, and one of the errors assigned is, trying the case in the absence of a replication, and of any issue upon these pleas. Testimony was introduced upon the trial to sustain the pleas, and it is evident from the record that they were not abandoned.

This case comes clearly within the rule announced by this court in 1855, in the case of McKinnon vs. McCollum, 6 Fla., 376, and unless we are prepared to overrule this case we must follow it here. It has been the rule for over twenty years, and must determine this case.

This court, in the case of McKinnon vs. McCollum, said: "Either the proceedings in the court below were very irregular, or the record is very defective. The two pleas of justification both conclude with a verification, yet they do not appear to have been replied to or present any issue for the jury to try. The first plea (the general issue) concluded to the country, and might, with propriety, have been submitted to the jury had the other two pleas been disposed of, but thus to submit it while these other pleas remained undisposed of was an error for which, if there were no other, the case should be sent back, as it clearly appears that they were not abandoned." See, also, 4 How., (Miss.) 352.

We will also say, without going into any elaborate examination of the testimony, that the evidence establishes that at least some of the logs, for the recovery of which this action was brought, were cut from the lands belonging to the Internal Improvement Fund or to the School Fund, to all of which lands the power of the Sheriff as *ex-officio* timber agent extends.

The judgment is reversed, and the case will be remanded for further proceedings consistent with this opinion and conformable to law.

ELIJAH T. HINOTE, APPELLANT, VS. SIMPSON & CO., APPELLEES.

1. No demurrer to evidence should be allowed and no judgment thereon given, unless the party demurring shall admit upon the record all the facts which the evidence conduces to prove.

2. It is not necessary to except to a judgment upon demurrer for the purpose of reviewing the same on error.

Appeal from the Circuit Court for Santa Rosa county.

Hinote brought an action of assumpsit, and declared for the price and value of goods bargained and sold to defendants; for work and materials; and for money had and received to the plaintiff's use. Plaintiff's bill of particulars was for 48 sticks of timber averaging 110 cubic feet each, worth $16 per stick, "which they took of mine and converted to their own use in March, 1874—$798."

Defendants pleaded that they never promised in manner and form as alleged; that the timber was the property of defendants and not the property of the plaintiff.

The cause came on to be tried by a jury, and the plaintiff submitted the testimony of several witnesses and rested.

The defendant's counsel then announced to the court that he demurred to the evidence, whereupon the court discharged the jury, and the defendant's counsel was proceeding to argue the demurrer, when the court said he did not care to hear from the defendants, but would hear first from plaintiff's attorney. After some remarks by the attorney he asked leave to amend the declaration by adding additional counts, and to amend in other respects; and on a subsequent day of the said term the court denied the motion, to which plaintiff excepted. The court also sustained the demurrer to the evidence, and ordered judgment for de-

fendant, and final judgment was entered accordingly. The plaintiff then appealed, and assigns for error:

1. That the court erred in discharging the jury upon the announcement by defendant's attorney that he demurred to the evidence and before demurrer filed, or rejoinder therein, or opportunity to join therein or to decline doing so, or adopting such other course as he may have desired.

2. That the court erred in refusing to permit the plaintiff to amend his declaration.

3. That the court erred in considering the announcement of the defendant's attorney that he demurred to the evidence as a demurrer, and also in *considering* the demurrer before joinder therein, or refusal to join therein.

4. That the court erred in considering the so-called demurrer without first requiring the defendants to admit the facts testified to by the witnesses, and of which there was none other than parol evidence.

5. In sustaining the demurrer.

C. C. Yonge for Appellant.

1. A demurrer is a written pleading, and should be signed. Sellon's Practice, p. 470; Buller's *Nisi Prius,* 313, 320; Money vs. Leech, Bur., 1692.

A demurrer to evidence is analogous to a demurrer to facts alleged in a pleading. 2 Tidd, 865; 2 H. Black., 205; 3 Black. Com., 372.

A party demurring to evidence cannot take advantage of any defect in pleading. 2 Tidd, 865.

The objection is that the declaration does not contain a count in trover or trespass, which is certainly an objection to the pleading.

2. Refusal to allow amendment of declaration. Courts are liberal in allowing amendments to attain the ends of

justice. The practice act of 1861 was adopted in this spirit.

Sec. 1 dispenses with forms of action.

Sec. 2 provides against the consequences of mistakes in actions.

Secs. 5 and 6 authorize amendments by adding other plaintiffs.

Sec. 7 provides for amending the writ.

Secs. 8 and 9 authorize amendments by the defendants.

Sec. 12 authorizes joinder of causes of action except ejectment and replevin.

Sec. 74 provides that *all defects and errors* shall at all times be amended, and whether there is any thing to amend by or not. The application for leave to amend was promptly made before demurrer filed, before joinder in demurrer, or argument on demurrer, and, if it had been allowed, the whole controversy could then have been tried and settled.

Leave should have been given before the discharge of the jury, but even after the discharge it ought to have been given, and a jury resummoned to assess the damages. 2 Tidd, 866, 867.

3. This error rests on same reasoning and authority as the first; also, see 11 Wheaton, 320, where it is held that there can be no judgment on demurrer to evidence till joinder therein.

4 . That the court should have required the defendants to have admitted the facts testified to, there being no other than oral proof. 2 Tidd, 866.

5. The demurrer ought not to have been sustained, because the plaintiff had the privilege to waive the tort, and sue in assumpsit. 1 Chitty's Pl., p. 198.

The proofs show a conversion and appropriation of the timber. The defendants converted the timber into saw-logs, and hauled it away.

The case of Higgs vs. Shehee, 4 Fla., 382, holds that the party demurring to the evidence admits not only the

truth of the facts to which he demurs, but the conclusions which may be fairly drawn from them. These conclusions are that they realized the value of the timber which they thus converted.

Every thing which the jury may infer must be admitted. 11 Wheaton, 171.

Demurrers to evidence have become almost obsolete, having been superseded by motions for new trials. Archbold N. P.

Demurrers to evidence should be discouraged. Bank of Md. vs. Smith, 11 Wheaton, 171; Fawle vs. Alexandria, 11 Wheaton, 320.

The special hardship in case.

Geo. G. McWhorter for Appellees.

The plaintiff, by not excepting to the action of the Judge, acquiesced in the discharge of the jury.

The bill of exceptions does not show that plaintiff excepted.

1. The motion to amend by "adding additional counts" was a waiver of any irregularity that preceded it. If plaintiff objected to the action of the court in discharging the jury, he should have excepted to such action and rested on his exception.

2. The court did not err in sustaining the demurrer. The court has a right to compel a joinder in demurrer to evidence. See Alexander vs. Fitzpatrick, 4 Porter's Alabama Reports, p. 405. The object of a demurrer to evidence is not to substitute the Judge for the jury as a trier of the facts, but to ascertain the law upon an admitted state of facts. The facts being admitted, there is no function remaining for the jury to perform.

3. The evidence shows a destruction of the property. No implied contract to pay for it can be presumed. The cases

that support the principle that a party may waive a tort and sue in assumpsit, limits its operation to those cases where the defendant has had the "beneficial use" of the property taken. See Greenleaf on Evidence, vol. 2, sec. 108, and note 5. This is the farthest extent to which these cases go. In many of them it has been held that the principle only applies to cases where "money" has been *actually received* from the sale of the property wrongfully converted. See same note, and also 17 Ala. Reports, 53, 54.

4. The court did not err in refusing to allow the amendment. "Adding additional counts" was too comprehensive; it embraced too much. The court was not advised whether the "additional counts" were appropriate or not. If there were any counts known to pleading, which would have been improper counts in an action of assumpsit, then the refusal was correct.

5. But whether the court was right or wrong in refusing the leave to amend, this court cannot revise its action, because the proposed amendment "which was offered to the consideration of the court below," or which "was considered by the court below," was not inserted in the bill of exceptions as required by act of 1853, of January 7, secs. 1 and 2; also Bush's Digest, 432 and 433, secs. 8 and 9.

C. C. Yonge in reply.

1. The motion to amend was no waiver, because the motion was not granted, and plaintiff had no opportunity of availing himself of the amendment he asked to be permitted to make.

2. That the court has the power to compel a joinder in a demurrer to evidence, does not sustain the second proposition of appellee. The court did not do so if it had the right.

3. The evidence does not show a destruction of the tim-

ber. "Timber" has a well recognized and known meaning as contra-distinguished from saw-logs; it is of much greater dimension, and generally too large for saw-logs without being cut in two. I have not now access to the record, but my recollection is, that the evidence was that they cut the timber in two, and hauled it to the stream. This was a conversion and appropriation of it. The current of authorities is to the effect, that when there is a *conversion,* even without sale of property, the tort may be waived and assumpsit brought for the value, though they are not perfectly uniform on this point.

But where there is a demurrer to evidence, the rule is that every presumption is in favor of the evidence demurred to, not only as to the facts proved, but the conclusions and inferences that may be drawn from them. It is a fair inference where there is a conversion of goods that the value is realized, else why a conversion? Higgs vs. Shehee, 4 Fla.

4. The motion "to add additional counts" should have been granted, unless the counts were such as could not, by the rules, be added. But the character of the counts was indicated by the objection made, to-wit: that where the proof showed a conversion of goods, that there could be no recovery in assumpsit. The court knew, and the defendant knew, that the count sought to be added was in trover. Why specify what was already obvious? The refusal excluded counts of *any* kind.

5. The object of the act of 1853 was to permit a party to assign *as error* a ruling of the court in the progress of a case, where such ruling did not result in a final judgment, there being no appeal except from final judgment. This ruling resulted in a final judgment, and the plaintiff was entitled to his appeal independent of that statute.

But in point of fact, the proposed amendment "which was considered by the court," was inserted in the bill of

exceptions. It was that the plaintiff be permitted "to add additional counts," and what these counts were, it has already been shown, was necessarily well known to the court, and it would have been a useless encumbrance to the record had they been copied into it. Another trial cannot injure the appellee. The denial of it would be fatal to the appellant, because his claims would be barred by the statute of limitations.

THE CHIEF JUSTICE delivered the opinion of the court.

Demurrers to evidence are so seldom resorted to, that in many of the States the practice is scarcely known to the profession. In this State but one case has been before this court, and then the question that arises here was avoided. Higgs vs. Shehee, 4 Fla., 382. From the reading of that case we infer that the demurrer was properly framed.

In the present case the plaintiff having submitted his testimony, all of which was oral, the defendant's counsel announced that he demurred to the evidence, whereupon the court discharged the jury, plaintiff's counsel asked leave to amend his declaration, which motion was denied, and the court gave judgment for the defendants upon the demurrer.

By consulting the ancient practice, the present case is readily determined.

If both parties voluntarily join in a demurrer to the evidence, and the demurrer is properly framed, and the necessary admissions are entered upon the record, the court must give judgment upon it.

When any evidence is produced, the opposing party, by expressly admitting the fact sought to be proved in support of the issue, upon the record, may demur and compel the party opposing the evidence to join in demurrer or waive

the evidence. The fact being admitted *upon the record*, the question of law is thus presented to the court.

From the rules thus stated it is apparent that if the party demurring to evidence does not make, upon the record, the admissions required in the particular case, and the opposite party, nevertheless, joins in demurrer, the court can give no judgment upon the demurrer, but must award a *venire de novo*.

On a demurrer to evidence, properly framed, *and joinder* in demurrer, the usual course is, immediately to discharge the jury of the issue in fact.

The foregoing rules are condensed from Gould's Pleadings, ch. IX., ss. 47—73, compiled from the English decisions and text writers. Cro. Eliz., 752; 2 H. Blacks., 206; Bac. Abr. Pleas, n. 7; Com. Dig. Pl., q. 10, &c.

In Gibson and Johnson vs. Hunter, 2 H. Blacks., 187, 209, Ch. J. Eyre, advising the House of Lords, said: "That upon the state of the evidence given for the plaintiff in this case, it was not competent to the defendants to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the plaintiff to join in demurrer, *without distinctly admitting* upon the record, every fact and every conclusion which the evidence given for the plaintiff conduced to prove." Second, as to the question, "whether on this record any judgment can be given?" to which we answer, "that we conceive no judgment can be given," for the reason that it was impossible to ascertain *from the demurrer* what were the facts. The case of Gibson and Johnson vs. Hunter we find cited by all courts as establishing the practice in such cases. (And see Fowle vs. the Com. Council of Alexandria, 11 Wheat., 320.)

In the case at bar we find that the demurrer was general, nothing was reduced to writing, no specific facts admitted upon the record, no joinder in demurrer, voluntarily or otherwise, but upon the naked announcement by defendants'

counsel that he demurred to the evidence, the jury was discharged and judgment rendered against the plaintiff. This error is "apparent in the record," by the entries made under the direction of the court, and therefore no exception was necssary to bring the question before this court.

According to the doctrine of the authorities the court could give no judgment upon such a demurrer.

It is not necessary to notice the error alleged, that the court refused to permit the plaintiff to amend.

As the case must go back for a new trial, the counsel will have an opportunity to tender such amendments as they may desire.

The judgment must be reversed, the judgment sustaining the demurrer vacated, and a new trial ordered.

JAMES D. GREEN, APPELLANT, VS. ZIBA KING, APPELLEE.

1. When a plea has been filed in due time but it is discovered that the officer before whom it was sworn to had omitted to sign the jurat, and the party makes affidavit that the plea was actually sworn to before it was filed and again swears to it before the court, it is not error for the court to refuse to strike off the plea as not sworn to.

2. It is not error for the court to allow a plaintiff only thirty minutes to add a similiter to a plea of not guilty in an action for a tort.

3. Where upon an application for a continuance for the term, upon affidavit of the absence of a witness, the opposing party admits in writing all the facts expected to be proved by such witness, it is not error to refuse a continuance on account of such absence.

4. Where an affidavit for continuance does not show the materiality of the testimony of an absent witness, or that any effort has been made to obtain the attendance or the testimony, it is entirely insufficient, and the continuance is properly refused. The rule as to the sufficiency of an affidavit for a continuance for the term, is

found in 9 Fla. R., 490, and in subsequent cases in 12th and 13th Fla.

Appeal from the Circuit Court for Levy county.

The facts of the case are stated in the opinion of the court.

J. H. Goss for Appellant.

J. B. Wall, J. T. Magbee, and *R. F. Taylor* for Appellees.

THE CHIEF JUSTICE delivered the opinion of the court.

The appellant brought an action in 1876 in Manatee county for trespass and malicious prosecution. The declaration charged that the defendant had falsely and maliciously procured the plaintiff to be indicted and tried, and subjected to great trouble and expense. Defendant pleaded not guilty, and set up several supposed matters of defense, in the form of pleas, and also demurred to the declaration. One of the attorneys in the case having been appointed Circuit Judge, the cause rested until 1878, when the venue was changed to Levy county, and came on at the fall term of 1879, for the action of the court, at which time the defendant abandoned and withdrew all his pleas, except that of not guilty, and also abandoned the demurrer.

The plaintiff's counsel insisted that there was no valid plea in the case, and moved to strike it out because the defendant had not sworn to it. It was found upon inspection that an affidavit of the truth of the plea was signed by defendant but the jurat was not signed. Whereupon defendant made his affidavit that he had, before filing, sworn to his plea before the County Judge, who had neglected to attest it with his signature, and the court then allowed the defendant to swear to his plea on file before the clerk. This was excepted to by plaintiff's attorney. Defendant's

counsel that he demurred to the evidence, the jury was discharged and judgment rendered against the plaintiff. This error is "apparent in the record," by the entries made under the direction of the court, and therefore no exception was necssary to bring the question before this court.

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counsel then desired time to prepare a replication to the plea of not guilty, and the court granted him thirty minutes for that purpose. At the end of that time, defendant having announced himself ready for trial, plaintiff filed an affidavit that he was not ready for trial, and could not safely proceed on account of the absence of honorable H. L. Mitchell, whose testimony he desired for the purpose of showing certain facts stated; and on account of the absence of James D. Haygood, of Levy county, who had not been subpœnaed, because the issues were not made up until that day, and on account of the absence of "several other witnesses" who resided in Manatee, by whom he expected to prove that the defendant swore falsely before the Grand Jury to obtain the indictment set out in the declaration; that he expected to obtain all said evidence by the next term of the court, and that this affidavit was not made for delay but for the purpose of obtaining justice, and that he could not safely go to trial without said evidence.

Upon this affidavit, and upon the statement of counsel that he could not safely go to trial owing to the amendment of the pleadings, plaintiff moved for a continuance until the next term.

The court ordered that the cause be continued unless the defendant would admit the facts which plaintiff desired to prove by Mitchell, as stated in his affidavit. This was excepted to by plaintiff. The defendant then filed an admission of the facts as stated to be within the knowledge of Mitchell, and demanded a trial. The Judge ordered that the trial proceed, and plaintiff asked time until the next morning to consider whether he would join issue upon the plea, which was allowed.

"On the following morning the plaintiff's counsel announced that he declined to join upon the plea, and rested his case upon his exceptions to the rulings of the court. Thereupon the defendant, by his attorneys, moved the court

for judgment dismissing said cause for want of prosecution, which judgment was then and there made and entered, the plaintiff saying nothing."

The plaintiff appealed from this judgment.

It is alleged for error that the court should not have allowed a plea while the demurrer was pending. The 34th section of the Practice act of 1861 allows a party to plead and demur to the same pleading at the same time upon making affidavit (if required by the Judge) of good faith, &c. The appellant, however, cannot raise this question here, because the demurrers were withdrawn.

The second and third errors assigned are the orders allowing the defendant to swear to his plea before the clerk on account of the omission of the County Judge to attest the jurat in the first instance, and in refusing to strike off the plea as not sworn to.

The court had clearly a discretion to allow the plea to be perfected by a proper verification. The statute of 1861, regulating practice and proceedings, sec. 4, gives the defendant a right to plead at any time before judgment, and this includes the right to make any proper amendment of his plea.

The fourth error assigned is, that the court allowed plaintiff's attorney only half an hour in which to reply to the plea. The only plea remaining was the general issue, not guilty. The Judge could well determine whether the counsel might within thirty minutes of diligent labor frame a *similiter* to this plea.

The fifth and sixth errors assigned are, that the court allowed a "conditional continuance," and refused a continuance for the term, and ordered a trial upon the filing of an admission by defendant of the facts alleged as being within the knowledge of Judge Mitchell.

This brings up the question whether the Judge exercised a sound discretion in refusing a continuance upon plaintiff's

affidavit as to the absence of Haygood, and other persons not named, none of whom had been subpœnaed. The affiant does not show in his affidavit that the testimony of such absent persons was material, nor does he even swear that he believes it to be material. He says he could not safely proceed to trial without their testimony, but he does not say that he would be in any better predicament if they were present. Nor does he show that the withdrawal of the defendant's special pleas made their attendance of importance, or that the case then presented any new phase. The admission of the facts sought to be shown by Judge Mitchell made his personal attendance or testimony unnecessary, and as to the others, we have no means of judging that the facts sought to be proved by them were essential to the plaintiff's case. He says, he expected to prove that "defendant swore falsely before the Grand Jury to obtain the indictment against him," but it is not stated whether any false statement of the defendant before the Grand Jury was a material statement, or that the Grand Jury were influenced by it to find the bill.

The suit was commenced in March, 1876, and the plea was filed during the summer of that year. The venue was changed to Levy county in November, 1878. In December, 1879, at the second or third term after the change of venue, these proceedings were had. Both parties resided in Manatee. There is no reason given for omitting to take the depositions of these unknown witnesses, or for not having them before the court. The defendant was there in readiness to proceed. It was proper for the Judge to enforce the rule as often announced by this court, to protect the defendant from being called at a long distance from home, and from being subjected to the necessary expense of preparing for and attending court with counsel and witnesses at several terms, and to require the plaintiff to show that he had used some diligence in preparing for the trial.

It does not appear that the plaintiff has used proper diligence, and it does not appear that the testimony of the absent witnesses was material, or that he had taken *any* steps toward procuring their attendance or testimony. The rule is laid down in Harrell vs. Durrance, 9 Fla., 490, (A. D. 1861,) has been enforced in Gladden vs. State, 12 Fla., 562, and 13 Fla., 623; Barber vs. State, 13 Fla., 675. The court therefore properly refused to farther postpone the trial.

The judgment of the Circuit Court is affirmed with costs against the appellant.

CALVIN L. ROBINSON, APPELLANT, VS. DIBBLE'S ADMINISTRATOR, APPELLEE.

1. Upon filing an amendment to a declaration with which declaration a bill of particulars was originally filed, it is in the discretion of the plaintiff to file new or additional particulars of his claim. His failure to do so is no ground for dismissal of the suit. Defendant's remedy in such case is found in the rule by which the parties are not allowed to give any evidence out of them.

2. To prove that books offered in evidence are the books of a deceased party and are books of original entry, it is not sufficient for the administrator to swear that the books came to his hands as administrator as the books of original entry of his intestate, and that he believes the debt is due. In all such cases there must be proof of hand-writing. In case of the death of parties making entries, they are presumed to have been made when they bear date and it is presumed that the transaction was of that date.

3. Whether books of original entry are in such condition, on account of erasures, interlineations, and like causes, as to justify their being submitted to the jury, is a question for the Judge of the Circuit Court to determine. His action in this matter cannot be reviewed here.

4. The business habits of the deceased party or the deceased clerk making the entries in a book, if admissible at all as evidence, are mat-

ters which go to the jury. They are matters affecting the "credibility of such evidence" within the meaning of the statute.

5. Chapter 1938 of the Laws of Florida, being an act in relation to testimony in civil actions, prohibits a party from being a witness in chief as to any transaction between himself and the deceased person. The purpose of this act was to enlarge, not to restrict the competency of parties as witnesses. Its effect is to prohibit a party being a witness in chief as to such transaction, but the party may still make his suppletory oath as to his books of account, his cross-examination being restricted to the matter of such oath. He cannot be a witness in chief in the cause as to such transaction.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

C. P. Cooper for Appellant.

J. M. and H. J. Baker for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an action of assumpsit brought by Franklin Dibble against Calvin L. Robinson to the spring term, 1868, of the Circuit Court for Duval County. The counts in the declaration are for goods sold and delivered, for work done and materials furnished, for money lent, for money received by defendant for the use of plaintiff, and for money due upon an account stated. With the declaration is filed a bill of particulars, being a general account embracing charges for cash, for merchandise, &c. On the 3d of July, 1868, the defendant filed his pleas taking issue upon the declaration, and a special plea to the effect that the goods alleged to have been sold and delivered to defendant were received by him as the agent and factor of the plaintiff, under an agreement that defendant should sell the same on commission, the commission to be one-half of the sum he

should receive above a price agreed upon. There was also a plea of payment and a plea of set-off, and with this plea of payment and set-off was filed a statement of account showing the items for which the charge was made and the amount claimed.

Plaintiff, F. Dibble, dying, his administrator, C. B. Dibble, was made a party. On the 29th December, A. D. 1874, plaintiff filed an amendment to his declaration. The amendment alleged that the said Franklin Dibble, in his lifetime, delivered to the defendant goods to the value of $11,483.62, as per bill rendered, that it was agreed between the parties that these goods should be sold by the defendant, and that defendant would sell and account and pay over to plaintiff the amount of said invoice of goods, and also one-half of the profits for which the said goods should be sold; that the defendant sold, disposed of, or used said goods, and has failed to account for and pay over the value of said goods arising from said sales as he agreed to do. On the 23d June, 1879, plaintiff filed his replication joining issue upon the pleas. On this day there was verdict for the plaintiff for $1,868.07. A motion for new trial was made, which, being denied, there was final judgment upon the verdict. From this judgment this appeal is taken.

The first three errors assigned may be considered together: they are that the court erred in overruling defendant's motion for a bill of particulars of plaintiff's cause of action alleged in his amended declaration; that the court erred in permitting plaintiff to withdraw said bill of particulars, and that the court erred in denying defendant's motion to dismiss the suit for want of a bill of particulars to plaintiff's amended declaration. With the original declaration there was filed a bill of particulars, and thus the requirements of the statute and the rule were complied with. There is no rule requiring that for each amendment of the declaration a new bill of particulars shall be filed. As was

remarked in the case of Waterman vs. Mattair, 5 Fla., 213, the only object of a bill of particulars is to apprise the defendant of the nature and extent of the cause of action in order that he may plead with the greater certainty. In this case the plaintiff had the right to file an amendment, relying upon his bill of particulars filed with the declaration. If the particulars filed with the declaration did not embrace and include the matters alleged in the amendment, the defendant's remedy against surprise was complete. He could have enforced the rule on the trial by which "the parties are not allowed to give any evidence out of them." Peak, N. P., 172; 1 Esp., *Ni. Pri.*, 195; 2 Bos. and Pul., 243; 2 Sel. Pr., 463.

The fourth error assigned is, that the court erred in admitting in evidence the account books of F. Dibble, deceased, offered by plaintiff. In support of this assignment of error it is contended that these books were not proved to have been books of original entry, and that it was apparent that they were not fairly kept.

The testimony as to these subjects was substantially as follows: C. B. Dibble, administrator, plaintiff, swears that books of account, 1, 2, 3, and 4, came into his hands as administrator of the estate of F. Dibble, deceased, in due course of administration, as the books of account of F. Dibble, the intestate, used by him in his lifetime in his business as a merchant, in the city of Jacksonville, and as his books of original entry of his transactions in said business, and that he believed the debt was unpaid.

Geo. R. Foster, for plaintiff, testifies that the entries in the books numbered one and two, were in the hand-writing of one Jesse Brush, now deceased, who was in his lifetime and during the months of June, July, and August, 1865, clerk for said Dibble, deceased. Upon cross-examination this witness testified that Dibble was very loose and careless in his manner of doing business, and that Brush, his

clerk, was a man of intemperate habits; that witness came from Lake City to Jacksonville a week or two before Brush left service of Dibble, and did not know, of his own knowledge, that Brush was ever intoxicated while he was in the employment of Dibble; that the entries in the books numbered one and two, including all those made in June, July, and August, were made by said Brush, and that upon comparing said books so offered in evidence all the entries in plaintiff's account were found to be charged in said books except $7.00.

The testimony of these witnesses does not establish that the books here offered were books of original entry.

The statute of this State, Laws of 1854, p. 65, ch. 662, provides that the "books of accounts of either party, in which the charges and entries shall have been originally made, shall be admissible, in evidence, in favor of such party."

There is no evidence as to the hand-writing in which books three and four are. The rule under the statute as well as before it, in cases of this character, requires proof of hand-writing. Where the entries are in the hand-writing of a deceased person, it is not enough, under any of the cases, for the administrator to swear to the general conclusion that the books came to his hands as administrator as the books of original entry of his intestate, and that he believes the debt was unpaid. The rule as stated by Mr. Greenleaf is: If the party is dead, the books, though rendered of much less weight as evidence, may still be offered by the executor or administrator, he making oath that they came to his hands as the genuine and only books of account of the deceased; that to the best of his knowledge and belief the entries are original and cotemporaneous with the fact and the debt unpaid, with proof of the party's hand-writing. 1 Green. Ev., note 1, par. 118; 3 N. H., 232; 6 Cush., 216; 20 Wend., 173.

What a man has actually done and committed to writing, when under obligation to do the act being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of a jury. This is the language of the court in the case of Welsh vs. Barrett, 15 Mass., 380. It is cited, with approbation, in 20 John., 173, and by the U. S. Supreme Court in 8 Wheat., 336.

The statute requires that the books shall be those in which the charges and entries shall have been originally made. This contemplates that the person making the charges shall be identified as one whose duty or employment or custom it was to make them in the ordinary course of business, and in this case proof of hand-writing was essential. The proof as to blotters 1 and 2 may possibly be sufficient. The books purport on their face to be the daily record of business transactions, and the entries are shown to be in the hand-writing of a deceased clerk, but, except from the internal evidence afforded by the entries themselves as made by him, there is no evidence that it was his business to make original entries as to the daily business of the party. We are inclined to think that is sufficient. But, however this may be, it is certainly very easy to establish that a part of the duty of a clerk was to make such entries, and it ought to be done in all cases by positive testimony where it can be. In case of the death of the party making the entry, it is presumed to have been made when it bears date, and that the transaction was of that date.

It was insisted that the books submitted as the books of original entry of the plaintiff's intestate should not have been submitted to the jury because of erasures and interlineations therein, and because of testimony that plaintiff's intestate was loose and careless in his manner of doing business, and his clerk was intemperate in his habits.

While there is a difference in the decisions of the courts

of other States upon the point whether this is a matter for the Judge or the jury, (1 Ark., 355; 3 N. H., 156; 8 Geo., 74,) this court has expressed the opinion that before the books of the party can be admitted in evidence, they are to be submitted to the inspection of the court, and if they do not appear to have been honestly and fairly kept, they are excluded, and if they appear manifestly erased in a material part, they will not be admitted unless the alternation is explained. 6 Fla., 738.

The books in this case were submitted to the Judge, and after inspection and the proofs of hand-writing, &c., he submitted them to the jury. Sedgwick, Justice, in Coggswell vs. Dolliver, 2 Mass., 222, speaking of an objection of this character says, that to suffer our enquiries to go behind the decision of the Judge in this matter would be throwing things into too loose a state, and we agree with that remark. In addition to this, we would say that we know of no rule or statute governing the practice of this court which authorizes appeals from decisions of the Judge of this character. So far as the general business reputation and character of the plaintiff's intestate is concerned, that, even if admissible at all, was a matter affecting the "credibility of such evidence," and was for the jury. This is also true as to the matter of the intemperate habits of the deceased clerk. 30 Barb., 42.

While several other errors are assigned in this case, we deem it material to examine but one of them.

After defendant's books had been placed in evidence, and one of the witnesses had sworn that some of the entries of charges against plaintiff's intestate in defendant's books were in defendant's handwriting, defendant was offered as a witness to testify as to the regularity and correctness of the entries in said books which were in his hand-writing. The court held that he was not a competent witness, and based its ruling upon the provisions of the act in relation to

timony in civil actions, approved February 14, 1874, ch-
)83, Laws.

The rule anterior to this statute, while there is conflict in
the cases, some States allowing the suppletory oath and
others not, (see 1 Phil. on Ev., note 108, p. 375,) we think
is correctly stated in the case of Eastman vs. Moulton, 3 N-
H., 157. The court there say: "The party, when called,
is in the first instance permitted to state only that the book
produced is his book of original entries; that the charges
are in his hand-writing; that they were made at the times
they purport to have been made, and at or near the time of
the delivery of the articles. He may, however, be cross-ex-
amined by the other party, in which case his answers be-
come evidence, and he is entitled to give a full explanation
of any matter, in relation to which an inquiry is made, on
the cross-examination. It is reasonable and proper that he
should be made a witness as far as the opposite side chooses to
to make him one; but a cross-examination to testify as to
independent facts not necessary to the explanation of the
facts respecting which he may have been questioned upon in
the cross-examination, does not entitle him to go beyond
this. It does not make him a witness in chief in the cause."

The purpose of the statute was to enlarge not to restrict
the competency of parties as witnesses. It made part
witnesses in chief in the cause, except as to certain matters
therein mentioned. The suppletory oath of the party
the effect mentioned above, we do not think makes him
witness in regard to a transaction between himself and the
deceased person, within the meaning of the statute referred
to. Its effect is to prohibit his being a witness in chief
the cause as to such transaction, and to restrict his cross-
examination to matters embraced in his suppletory oath.
To the extent that the ruling of the court was inconsistent
with the view we have expressed, we think it was error.

The judgment is reversed, and a new trial is awarded.

GOLPHIN TISON, APPELLANT, VS. MONTGOMERY L. BROWARD, APPELLEE.

1. In an action of trespass upon lands, it is not necessary for the plaintiff to prove his title or actual possession of the *locus in quo* where the possession of the plaintiff is admitted by the pleadings.

2. Where the defendant, in an action of trespass upon lands, pleads not guilty, and that the land was the property of the defendant in fee simple, such plea admits the possession of the plaintiff, and the defendant must show his title in order to defeat a recovery.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

J. C. Marcy & Sons for Appellant.

Aristides Doggett for Appellee.

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THE CHIEF JUSTICE delivered the opinion of the court.

Plaintiff declared in trespass *quare clausum fregit*, describing the lands as in sections 19 and 20, township 1, range 27, east, being part of the "Broward tract," and alleges the cutting down of trees, &c., the lands being the close of the plaintiff. Defendant pleads not guilty; and, further, that the land upon which the alleged trespass was committed, and timber and trees cut and removed, is the fee simple property of defendant, and the timber removed was his property. There is another plea that defendant was the owner, and in the rightful possession at the time of the alleged trespass.

There was testimony introduced by plaintiff tending to show that he had been in possession some years, had "grown up" on the land described, the cutting of trees by defendant, and their value. Plaintiff testifies that defend-

ant said he was willing to pay for the trees, or give plaintiff the same number of trees. Several witnesses were examined on behalf of both parties in regard to the possession, the boundary lines of the land claimed by both parties, and with respect to damages. The alleged trespass seems to have resulted from the errors of surveyors, or of imperfect maps from which surveys were made.

Defendant testified that he bought the land from his brother five years ago; that he never knew of Charles Broward or M. L. Broward claiming this land until about the time suit was brought, and that he and his brother claimed possession since 1872; it was formerly State land. Never agreed to pay Broward for the trees, but told him he would pay for the same or give other timber for it if it should be found that he did not own the land. No evidence of legal title was offered.

The Judge charged the jury "that the plaintiff should show what seems sufficient to establish his possession, then the jury may fix the amount of damages. The verdict must be based on the testimony in the case and of the witnesses as relating to damages, and must not be subject to conjecture."

No exception was taken to this charge by either party.

Defendant's counsel asked the court to charge the jury as follows: "That the plaintiff must show to the full satisfaction of the jury the absolute and complete possession of the premises in question, or at least that they had a full legal title, which involves possession or right to it, and, therefore, if the jury believes that the plaintiff had not exhibited his title or shown his possession, the verdict must be for defendant and against the plaintiff."

The Judge refused so to charge, and defendant excepted.

The jury found for the plaintiff and assessed the damages, upon which final judgment was entered, after a motion for a new trial was denied, and defendant appealed.

The errors assigned are:

1. The refusal of the court to charge the jury as requested by defendant.

2. That the verdict was against the charge of the court and the law of the case.

3. That no trespass was proven nor any possession shown of the premises upon which the alleged trespass was committed.

Defendant's counsel contends that there was no evidence showing plaintiff's title, possession, or right of possession.

The law of this case is so well ai ddown in Brest vs. Lever, 7 Meeson & Welsby, Exch. R., 593, that we will only quote from the opinion of the court. The action was trespass *quare clausum fregit*. Plea, that the close was the close, soil, and freehold of the defendant. The defendant proved acts of ownership over the *locus in quo* for seventeen years before suit. Neither party proved *title* in himself. The court, Parke, B., said: "By the plea of *liberum tenementum*, the defendant admits that the plaintiff is in possession, and that he is himself, *prima facie*, a wrong doer; but he undertakes to show a title in himself, which shall do away with the presumption arising from the plaintiff's possession. This he was bound to do, either by showing title by deed, in the usual way, or by proving a possessory title for twenty years. But here the defendant has only proved acts of ownership extending over seventeen years, and has not connected them with any prior title; it amounts, therefore, to nothing more than a longer against a shorter possession, a mere priority of possession, and for a period insufficient to confer any title, except against a mere wrong doer." See, also, 2 Greenleaf Ev., par. 626, and citations in n. 4; Stephens' *Nisi Prius*, 2641, 2644; 1 Saund., 347, d. n. 6; 1 Ch. on Pl., 541; Gould's Pleading, ch. VI., sec. 93.

The defendant here, by his pleading, admits the possession of the plaintiff. It was not therefore necessary to

prove that which was admitted. The cutting of the trees on the premises was also admitted by the same plea. All that it was necessary, therefore, for the plaintiff to prove was the value of the trees or the amount of the damage. The defendant must then show title in himself, and this he has failed to do. He neither shows title by judgment, decree, or conveyance of any sort, nor does he show an adverse possession with claim of title, with or without written instrument, judgment, or decree, for the statutory period of seven years. He only shows that since 1872 he was in possession, exercising acts of ownership by cutting trees. This suit was commenced in March, 1879.

The court, therefore, did not commit an error in refusing to charge the jury that the plaintiff must prove "absolute and complete possession" or "full legal title," under the pleadings in this case.

The authorities cited to show that plaintiff must prove actual possession or title, in order to show his right of action, do not apply where such possession is shown and admitted by the pleadings.

The judgment is affirmed.

SANDERSON'S ADMINISTRATORS, APPELLANTS, VS. THOMAS AND LIVINGSTON FOR USE OF INGLIS, APPELLEES.

1. Cause of action on merchant's account accrued against intestate in January, 1868; intestate died in June, 1871, and letters of administration issued in November, 1871; suit commenced in August, 1876, plea of statute of limitations which was passed February 27, 1872; no allegation that claim had been presented, under the statute of non-claim, to the administrators; on demurrer to the plea, *Held*: That the plea was good.

2. Prolixity or superfluous statement of facts leading to a single conclusion of law, does not necessarily render a plea demurrable for duplicity.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

Fleming & Daniel and *Hartridge* for Appellants.

The first ground of demurrer we did not understand as seriously urged on the hearing.

The facts set forth in each plea form but one connected proposition and defense.

"No matters, however multifarious, will operate to make a pleading double that together constitute but one connected proposition or entire point." Stephens on Pleadings, page 262.

If it should be held that the last clause of the 8th plea —that the action was not commenced within six months after the approval of the Statute of Limitations, was immaterial—it would only be rejected as surplusage, and cannot be held to make the plea double, because it could not be construed to be a separate defense of itself.

"Matter immaterial cannot operate to make a pleading double." Stephens' Pleadings, page 259.

The 8th and 9th pleas aforesaid are drawn under the act of the Legislature of the State of Florida, entitled "An Act of Limitations in Civil Actions," approved February 27th, 1872, (Ph. Laws, ch. 1869,) and more particularly under the latter clause of the 15th section of said act, which is as follows:

"If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors or admin-

istrators after the expiration of that time and within one year after the issuing of letters testamentary, or of administration."

It was contended on the other side that the said J. P. Sanderson having died, as is shown by the plea, before the passage of the Statute of Limitations now in force, that the statute has no application to this action, or, at any rate, the time limited by the statute does not commence to run until the date of the act.

We think that this objection is fully met by the construction of the statute by this court, in Spencer vs. McBride, 14 Fla., 403, where the court use the following language:

"The proposition that the act relates only to rights of action to accrue in the future is in conflict with the express letter of the statute and the manifest intention of the Legislature. It would make the statute perpetuate in part the very evil it was conceived to remedy. It is too clear for argument that if the limitation thus enacted refers only to rights of action that are to accrue in future, then all the rights of action that have accrued in the past are without limitation under this act, and the suspending act of 1861 is still in force as to them."

And again, "The general power of the Legislature over the subject of limitation of actions is too well settled to admit of question. It is also well settled that statutes of this character apply to rights of action existing at the time of their passage, provided a reasonable time is left after the passage of the act for the party to exercise the right before it would operate as a bar."

In Ross vs. Duval, 13 Peters, the Supreme Court of the United States use this language: "It is a sound principle that where a statute of limitation prescribes the time within which suit shall be brought, or an act done, and a part of the time has elapsed, effect may be given to the act, and

the time yet to run being a reasonable part of the whole time, will be considered the limitation in the mind of the Legislature in such cases."

The intention of the Legislature in framing the 15th section of the act of February 27, 1872, as it applies to claims against the estates of deceased persons, was doubtless to enlarge the time limited by the statute independent of this section for such period as shall exist between the expiration of the time for commencing the action, as generally provided, and the expiration of one year from the date of the issuing of letters of administration on the estate, if such interavl shall exist.

In the case at bar, the claim accrued as set up in the 9th plea on January 9, 1868, and the four years expiring January 9, 1872, it would have come under the 19th section, and the time limited by the statute have run six months after its approval to August 27 1872, but for the provision of the 15th section, which extends it still further, reaching to November 7, 1872, one year after the issuing of letters of administration, being eight months and eleven days after the passage of the statute of limitations, and two months and eleven days longer than the period held by this court, in Spencer vs. McBride, to be a reasonable time given after the passage of the act within which to commence the action.

It was contended by the appellees that the defendant's administrators are trustees of all creditors of the estate, and come within the class excepted from the operation of the statute by the 20th section.

And in support of the proposition that administrators are trustees cite McDonald, administrator, vs. Bogue, 14 Fla., 363.

The 20th section, above referred to enacts "that the act shall not apply with respect to any monies or property held or collected by any officer or trustee or his sureties." To

give the 20th section the construction contended for by the appellees, would be repugnant to, and in effect nullify section 15, which expressly names administrators, and the time within which an action, having accrued against the intestate in his lifetime and not barred at the time of his death, may be commenced against such administrators, and would be in violation of the following rule of interpretation laid down in Potter's Dwarris on Statutes, &c., 144, as established by the American courts:

"In the construction of a statute every part of it must be viewed in connection with the whole, so as to make all its parts harmonize, if practicable, and give a sensible and intelligent effect to each."

"It is not to be presumed that the Legislature intended any part of a statute to be without meaning." Cites in support of the rule, Ogden vs. Strong, 2 Paine R., 584; 1 Kent Com., 162; People vs. Draper, 15 N. Y., 532.

Although an administrator may, in some instances, occupy the position of a trustee as to a specific property or fund held for creditors, certainly the popular and received import of the word *trustee*, as used in the statute, is not administrator, nor are the words synonymous in their popular or received import, and it seems to us that it would be a forced construction to interpret the word trustee, in the 20th section, to mean administrator, and thereby antagonize the 20th section to the 15th section of the act.

If, on the contrary, we give the word trustee its popular and received import, we harmonize the different portions of the statute, and give a sensible and intelligent effect to each.

Again, the language of the 20th section refers to some specific property or fund in the hands of a trustee, and by him held for the benefit of his *cestui que* trust, and even though it should be held that the term trustees included administrator, it would only apply to an action to reach some

specific property or money in the hands of the administrator held for particular creditors.

Let us now examine the case in 14 Fla., (McDonald vs. Bogue,) above referred to, and relied on by appellees.

There was an attempt in that case to construe the statute of limitations of February, 1872, the suit having been commenced more than a year anterior to the passage of that act, and it is there decided, reaffirming Hart vs. Bostwick, 14 Fla., 172, that there was no statute of limitations in force at the time that the suit was commenced.

It seems to us that the decision in the above cause sustains us. Though not positively deciding as the statute of 1872 was not involved in the case, it seems very strongly intimated by the court that, in an ordinary action at law, the statute of limitations may properly be pleaded against administrators, the decision being based upon the fact that McDonald, the administrator, held a fund which had been raised from the sale of the intestate's property for paying certain particular claims which had been presented within the two years admitted, and a dividend paid thereon. A very different state of facts from the case at bar, where there is no particular fund held by the administrator which is sought to be reached, but an ordinary action at law, not commenced within the time limited by the statute.

If it were held that administrators are trustees, so that no statute of limitations could run in their favor against creditors, even though expressly named therein, the same principle would apply to the requirement, likewise a statutory provision, that all claims must be presented within two years after the publication of the administrator's notice to creditors, or the same will be barred.

Angus Patterson for Appellee.

This is a suit brought by the defendants in appeal upon

an open account made by John P. Sanderson, in his lifetime, and was presented to his administrators, the plaintiffs in appeal, within the two years after notice required by the statute of *non claim.*

There were several pleas filed, to which demurrers were interposed and sustained, and to these decisions the defendants, plaintiffs in appeal, submitted by pleading over. Ellison vs. Allen, 8 Fla., 206; Johnson vs. Pensacola and Perdido R. R. Co., 16 Fla., 623.

There is no bill of exceptions. Rule 97, Thom. Dig., 351; Robinson vs. Mathews, 16 Fla., 319; City of Jacksonville vs. Lawson, 16 Fla., 321; Proctor vs. Hart, 5 Fla., 465; see, also, 5 Peters, 199; 4 How., U. S., 298; 8 Fla., 14 and 16; 3 Fla., 110.

As to the facts and the merits of the case there is no dispute.

The defendants, plaintiffs in appeal, rely mainly upon the statute of limitations.

John P. Sanderson died in the year 1871, and notice to debtors and creditors was given by publication in the year 1871, and the claim in this case was presented in due time. The claim was not barred at the death of the intestate, as there was no statute of limitations in force in this State. Hart vs. Bostwick and wife, 14 Fla., 162; McDonald, administrator, vs. Bogue, 14 Fla., 363.

The statute of limitation passed in the year 1872, the only statute of limitation in force, does not apply "to monies or property held or collected by any officer or trustee, or his sureties." See acts of 1872, Laws of Florida, ch. 1869,

clause.

trustee, and holds the proceeds or

Donald, Adm'r vs. Bogue, 14 Fla., 363; Haynes, Adm'r. vs. Bessellien et al., Ark., 499; Thom. Dig., 206; par. 3; McHardy et al. vs. McHardy's Ex'rs, 7 Fla., 301, and cases cited, 313, 314 and 312 of the opinion.

The administrator is also an officer, (2 Bl. Com. margin, 496; 2 Bouv. L. D., 85,) and until he performs all his duties as such officer, and is discharged, the Statute of Limitations will not bar the claim of any one entitled to the moneys in his hands as such officer. Thom. Dig., 207, par. 7; Thom. Dig., 211, sec. 11, par. 1.

The 15th section of the Statute of Limitations does not apply to this case, because the administration had been long going on before the statute was passed.

THE CHIEF JUSTICE delivered the opinion of the court.

This cause was heard below before a referee in Duval county.

John P. Sanderson died June 29, 1871. Letters of administration were issued to appellants November 7, 1871. This action was assumpsit, commenced by summons in August, 1876, upon an itemized account for goods sold, the last item of which is dated January 9, 1868.

There was a declaration filed, to which several pleas were pleaded by defendants, after which the declaration was amended, to which the same matters, in other form, were pleaded by defendants.

The first plea was a general denial of indebtedness, upon which plaintiff took issue. Six additional pleas were filed, to all of which plaintiff demurred (except the sixth plea), and the demurrers sustained. The "sixth plea" does not appear to have been disposed of, as far as can be discovered.

Defendants afterwards filed two additional pleas, numbered eight and nine.

The 8th plea alleged that Mr. Sanderson died June 29,

1871, before the expiration of four years after the cause of action accrued; that letters of administration were issued November 7, 1871; that this suit was not commenced within four years after the cause of action accrued, nor within one year after the letters were issued, nor within six months after the approval of the Act of Limitations of February 7, 1872.

The 9th plea set forth the date of the accruing of the cause of action, the death of Sanderson, the issuing of letters November 7, 1871, and that the suit was not commenced within four years after the letters of administration were issued.

The plaintiff demurred to these pleas: 1, for duplicity; 2, the statute does not bar the action against defendants as administrators or as trustees; 3, the Act of Limitations, of February 27, 1872, does not apply to this action; 4, the statute of non-claim was the only statute of limitation in force.

The referee sustained the demurrer, and the cause being submitted, judgment was rendered for plaintiff, which was recorded in the Circuit Court, and the defendants appealed.

The appellants assign for error the judgment sustaining the demurrer, and overruling the eighth and ninth pleas.

The act of February 27, 1872, limiting the time for commencing civil suits, provides, in section 10, that actions "for any article charged in a store account shall not be barred until four years," and must be commenced within that time after the cause of action shall have accrued. Counsel agree that this is a suit upon a "store account."

Section 15 provides a limitation of the time for commencing actions by and against executors and administrators, and that "if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors or ad-

ministrators after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." By section 19, all actions not barred by statute before the approval of the act, are not affected by the limitations of the act until six months after its approval.

It was urged on the argument, for appellees, that the general statutes of limitation did not apply to the circumstances of this case because of the operation of the "statute of non-claim." It must be remarked, however, that there is no allegation in the declaration, and no admission in the eighth and ninth pleas, that the claim had been "presented" to the administrators otherwise than by the commencement of this suit. If it was intended to present this question, some facts should have been stated in the pleadings upon which the point can arise. The point stated by counsel is, that after a claim is presented to the administrator, the latter, having the assets in charge, is a *trustee* as to all persons entitled to any share or payment out of such assets. But there is nothing here informing us that this claim has ever been so presented. The statute of non-claim, therefore, does not enter into this case.

The cause of action accrued in 1868. Sanderson died in 1871, and letters were issued in November of that year. The cause of action was not barred at the date of the act of 1872, because there was no statute limiting the time for commencing suit then in existence. As to all classes of action not barred, but which would be barred by the terms of the act of 1872, the time for bringing suit was limited to six months after its passage and approval, to-wit: by August 27, 1872.

This was held by the court in Spencer vs. McBride, 14 Fla., 403.

This suit was commenced in August, 1876, and it is obvious that it was not commenced until long after the statu-

tory period of limitation, more than four years and six months after the cause of action had accrued having elapsed, and no intervening disability affecting the question.

The pleas do not appear to be liable to demurrer for duplicity. Both show that the suit was not commenced within the time limited by law. Prolixity or superfluity of statement does not necessarily render the pleas double.

The referee erred in sustaining the demurrer to the 8th and 9th pleas to the declaration, and the judgment must be reversed with costs.

NOTE.—Mr. Justice Westcott did not sit at the hearing of this cause.

JOSIAH T. WALLS, APPELLANT, VS. M. ENDEL, ET ALS., APPELLEES.

1. An objection to the competency of a witness whose deposition is offered in evidence, may be made at the time it is offered; and such objection is not waived by an objection made only to the time and manner of taking the deposition, at the time of receiving notice of the taking.

2. Title deeds cannot be received in proceedings under the forcible entry and unlawful detainer act for the purpose of basing a right of action or defense upon the title, except when the possession of a part is shown, for the purpose of showing the boundaries or the extent of the possession claimed. No question of title can be entertained, and it is not competent for the jury, in such proceedings, to determine whether certain papers constitute a deed or a mortgage.

Appeal from the Circuit Court for Alachua county.

The facts of the case are stated in the opinion of the court.

E. C. F. Sanchez and *F. E. Hughes* for Appellant.

J. H. Goss, and *Thrasher, Davis & Hampton* for Appellees.

THE CHIEF JUSTICE delivered the opinion of the court.

Walls commenced proceedings against Endel and others, under the act relating to forcible entry and unlawful detainer. The premises are a house and lot in the city of Gainesville. On the part of the complainant it was shown that the premises were occupied by him and his family, and had so been occupied for several years. In the latter part of 1877, Walls was taken to the lunatic asylum as a lunatic. While he was thus away, the Endels went repeatedly to the house, then occupied by Walls' wife, and wanted her to give up possession to them, representing that they had a title by deed from Walls and wife, and were entitled to possession; told her she could not afford to pay them rent; that they had rented the house to another, and insisted on her leaving and giving up possession. Mrs. Walls was sick and much worried on account of the sickness and absence of her husband in the asylum, and the efforts and importunities of the Endels, and left the premises, when the Endels immediately took possession and put a tenant in, who remains in possession under them. Walls came home in January, 1878, and meeting one of the Endels, said to him that he had heard they had turned his wife out of possession, and asked who was in the house. Endel answered, "Nobody," and added, "that is all right, General, if you come around to-morrow I will give you the key." Walls went to them the next day, and they told him they "had rented the house to Dr. Seigler, and he was already in."

Walls testified that he had never agreed to pay rent to the Endels. M. Endel, Jr., testified, under objection, among

other things, that "Walls was our tenant from July, 1876, to the time he was declared a lunatic. We bought the house from him in July by an absolute deed."

Defendants offered in evidence a deed, executed by Walls and wife, dated 28th July, 1876, for the consideration of $1,250, conveying the premises to the Endels. The introduction of the deed was objected to by appellant's counsel on the ground that the question of title was not involved, and the objection was overruled, and the deed permitted to be read in evidence on the part of the defense, to which ruling appellant excepted. Counsel also requested the court to instruct the jury not to consider any testimony of witness relating to the deed, which request the Judge refused, to which exception was noted.

Appellant introduced an agreement dated 29th July, 1876, executed by the Endels, the grantees in the deed, whereby they covenant to sell and convey to Walls the same premises on payment to them by Walls of the sum of twelve hundred dollars by the first day of December, 1877, else this agreement to be null and void.

The testimony shows that the consideration for the conveyance by Walls and wife to Endel and son was in part a balance of about six hundred dollars, owing by Walls to them on merchant's account, and the balance to be paid by advances and credits to Walls to carry on his plantation.

During the presentation of the testimony by complainant, he offered the deposition of Mrs. Walls in evidence, but it was objected to on the ground that she being the wife of complainant, was not a competent witness and the testimony was excluded by the court, to which an exception was taken by complainant.

The Judge delivered his charge to the jury, and instructions were given or refused, as offered by respective counsel, but no exceptions were noted.

The jury returned a verdict for the defendant, whereupon

judgment was rendered against complainant. The court adjourned for the term immediately after the rendition of the verdict, and before a motion for a new trial could be spread upon the minutes. Complainant appeals.

The errors relied upon to reverse the judgment are: 1. The rejection of the deposition of Mrs. Walls as evidence, no objection to her competency having been made until the trial. 2. The admission of the deed of Walls and wife as evidence for defence. 3. The refusal of the court to instruct the jury to disregard the testimony of defendants respecting such deed.

I. As to the rejection of the testimony of Mrs. Walls in behalf of her husband, it is insisted that the objection made at the time of the notice of taking the deposition is the only one that can be urged. That was as to the manner and time of taking it. That she was not a competent witness in her husband's behalf need not be argued. She was not competent at common law, and the statute of this State had not made her so at the time of this trial. Objections to competency can be made when the deposition is produced, in the same manner as when the witness is tendered for examination on the trial. (Thomp. Dig., 340.) There is nothing in the peculiar circumstances of this case or of the parties which allows an exception to the general rule of competency. (1 Greenl. Ev., section 334, *et seq.*)

II. The defendants offered and the court admitted them to introduce a deed of conveyance of the premises. The only purpose of showing this deed was to show defendants' title as a supposed justification of their entry and detention. In proceedings of this character, evidence of title cannot justify a forcible or wrongful entry, or an unlawful detainer. Neither party can give evidence of title as a foundation for the right to maintain or to defend in this proceeding. Title deeds are not received except where, the possession of a part being shown, the deed is examined for

the purpose of ascertaining the boundaries or the superficial extent of the premises. (See the numberless authoritis cited in the Digests.) Our statute is explicit that "no question of title, but a right of possession and damages, shall be invoked in the action." (Chapter 1630, act of 1868, sec. 20.)

The complaint here is for a forcible turning out of complainant and an unlawful withholding of the possession. If the entry is forcible or unlawful and the possession is withheld without the consent of the party evicted, the summary remedy provided by statute may be employed, and the question as to who has the better title is not permitted to be tried under such proceeding. The real question is whether the possession is unlawfully withheld by defendant after obtaining it. His title, if he has one, will not protect him in such possession.

It is evident from the proceedings before the court, that the sole purpose of the offer and admission of the deed in evidence, was to show the defendants' title as a justification of the entry and detention. The court overruled the objection to the introduction of the deed, which objection was upon the ground that the title was not in question; and the court also refused to charge the jury that they should not consider the testimony in reference to the deed. The charge of the court submitted the matter to the jury as a question of title. He instructed them that if they should find that the deed and the agreement were parts of one transaction and constituted a mortgage by Walls to Endel, then Walls had the right of property and of possession until a foreclosure. It thus appears that the jury, under the direction of the court, considered the question of the title as derived from the deed; and this the statute expressly forbids. We can conceive no ground for the introduction of the deed or the agreement in this case.

The only evidence in this record, bearing upon the issues,

was the occupation by Walls and his family for several years of the premises as a residence, the frequent visits of the Endels, or one of them, to the house while Walls was shut up in a Lunatic Asylum, the persistent efforts, "out of pure kindness," to induce Mrs. Walls to give up to them the possession, by representing to her the poverty and helplessness of her condition; that her title was gone; that she would be unable to pay the rent they demanded; that they had rented the premises to another; all this without notice to her husband, or to his committee or guardian, until she, "sick and worried," (as the evidence shows,) was induced to leave, and the Endels forthwith took and hold the possession thus acquired. The apparently unexpected apparition of Walls returning from the Lunatic Asylum, and the conversation between him and Endel on that occasion, may have a bearing upon the transaction. These were the principal facts upon which the jury should have determined the issues, instead of a consideration of the character of the title.

The yielding by the "sick and worried" wife of the lunatic of the possession, under these circumstances, can have no influence upon the rights of Walls, nor upon the rights of the defendants.

The degree of "force" necessary to be shown to sustain the charge of a forcible entry may be ascertained by consulting the American cases cited in n. 1, sec. 787, Taylor's Landlord and Tenant, sixth edition; see, also, 1 Head (Tenn.), 136; 4 Bibb, 388; 2 Swann, 50.

In proceedings of this character there may be a conviction of the unlawful detainer alone, or of the forcible entry and unlawful detainer, the detention being the substantial question and the gist of the proceeding; the unlawful entry and the unlawful detention are two distinct offences which may, under the statute, be tried together. (People vs. Anthony, 4 Johns., 201; People vs. Reichert, 8 Cow.,

226; Foster vs. Kelsey, 36 Vermont, 199; Cammack vs. Macy, 3 A. K. Mar., 296.)

The judgment must be reversed with costs, and the cause remanded with directions that the verdict be set aside and a *venire do novo* awarded.

Mr. Justice Westcott did not sit in this case.

WILLIAM T. COONS, APPELLANT, VS. JOHN W. HARLLEE, APPELLEE.

1. On the rule day, being the return day of summons in assumpsit, the clerk made the following entry: "There being no appearance, plea, or answer, on motion of plaintiff's attorney judgment is given by default in the sum of $202.68, principal and interest;" *held*, that this is not a final judgment, but only a default.

2. In case of a default in an action upon a promissory note, for want of appearance, demurrer, or plea, the clerk may, after entering the default, upon production by the plaintiff of the note and filing it, assess the amount due upon it and then enter final judgment in favor of the plaintiff and against the defendant for the amount; and the facts of the production and filing of the note and the assessment of the amount due, should appear in the record, to authorize the entry of final judgment, and to show the basis of the judgment. (Sections 6 and 7, chapter 1938, Laws 1873.)

3. No appeal can be taken until the entry of final judgment in a suit at law.

Appeal from the Circuit Court for Manatee county.

The facts of the case are stated in the opinion of the court.

James T. Magbee for Appellant.

No counsel *contra*.

THE CHIEF JUSTICE delivered the opinion of the court.

Action of assumpsit by Harllee, appellee, against appellant. Summons served March 5, 1878, returnable on rule day in April. Declaration filed on rule day upon promissory note. Neither the note nor copy of note annexed to or filed with thee declaration, which describes the note as payable "to the order of the sum of two hundred and two dollars and ninety-nine cents."

On said rule day the following entry was made by the clerk: "John W. Harllee, agent, vs. William T. Coons. Be it remembered that on this, the first day of April, 1878, the same being rule day thereof, and there being no appearance, plea, or answer, on motion of plaintiff's attorney, judgment is given by default in the sum of $202.68, principal and interest, sheriff's fees, $6.50; clerk's fees, $2.90."

There is no other entry purporting to be a final judgment. Among the papers is found a promissory note dated October 29, 1878, signed with defendant's name, payable one day after date to the order of John W. Harllee, agent, for $202.99. There is no mark on the note showing that it had been filed with the clerk, or that any assessment of damages had been made upon it, nor is there any statement in the record showing when or how it came into the custody of the clerk. The declaration does not describe a note payable to plaintiff or to any other person.

On the second day of July, 1878, an execution was issued by the clerk, commanding the sheriff to collect "the sum of two hundred and fifteen dollars and thirty-six cents, the amount of debt due from the said William T. Coons to John W. Harllee, agent, on the 2d day of July, A. D. 1878, by the judgment of the Circuit Court of the State of Florida for the Sixth Judicial Circuit for the county of Manatee recovered against the said W. T. Coons, and that you also

cause to be made the additional sum of $10.10" for costs of suit.

Afterwards defendant's attorney made a motion to set aside the judgment and the execution for irregularity. This motion was denied, and the defendant appealed, and seeks to reverse the judgment.

We find in another paper, purporting to be a copy of the record on file in this court, a copy of the "judgment" which recites that the judgment was "given by default in the sum of $210.68, principal and interest," besides costs. The execution does not describe either of these "judgments" as to the amount. We merely refer to these several discrepancies for the purpose of calling the attention of the officers and parties to the series of blunders apparent here, by which the parties have doubtless been subjcted to much loss of time and expense.

The necessary conclusion of this court, upon an examination of the record is, that there has been no final judgment in the case, and hence this appeal must be dismissed, as no appeal will lie except from a final judgment at law.

The statute provides (ch. 1938, sec. 6, approved February 24, 1873,) that if the defendant shall fail to appear on the return day of the writ, the plaintiff may cause a default to be entered by the clerk against the defendant duly served, and thereupon he may proceed to take final judgment, as here inafter provided. The seventh section says, that upon th entry of any default for want of appearance, demurrer, (plea, in any suit for the recovery of money founded on co tract, and the action is on a written instrument for the pa ment of money, the plaintiff at any time after such defa may, on the production and filing of such instrument, ca final judgment to be entered for the amount thereof v interest, and the clerk of the court shall assess the amc which the plaintiff is entitled to recover, for principal interest, and enter up judgment for the same. This w

seem to be sufficiently plain. In this case there is judgment for default. The record does not show that the plaintiff produced to the clerk the note described in the declaration, or any other note. It does not show that the clerk assessed the amount due thereon, nor that final judgment was thereupon entered in favor of the plaintiff and against the defendant. The entry is lacking in every essential particular to constitute a final judgment or recovery by one party against the other, and was no basis for the issuing of an execution. The record should show the basis of the judgment, the production and filing of the proof after default entered, whether the action is upon a note or an open account. Snell vs. Irvine, et al., 17 Fla., 234.

The appeal is dismissed with costs of the appeal against appellant, and the clerk will transmit a copy of the opinion herein to the court below, together with the mandate of this court.

SARAH AND BETHEL DANIEL AND BERNICE SAMS, APPELLANTS, VS. MOLLIE SAMS, APPELLEE.

1. "A marriage valid at common law is valid notwithstanding the statutes of the State where it is contracted prescribe directions respecting its foramtion and solemnization, unless they contain express words of nullity."

2. While there was a moral obligation which natural law imposed in the relation of husband and wife among slaves, still its legal consequences were regulated by the municipal law, and the issue of that relation, under the law, did not possess inheritable blood. The issue of a customary slave marriage, while not bastards, were yet not legitimate in the sense that they could inherit property acquired by their ancestors after emancipation. This is the principle upon which the legislation of this State is based.

3. A customary slave marriage of a free man of color and a slave woman, no other marriage or other legal impediment intervening, confirmed after emancipation of the woman by cohabitation as husband and wife, or by any other plainly established assent by both parties to the continued existence of the antecedent relation of husband and wife, renders the issue born in slavery legitimate.

4. The cohabitation as husband and wife contemplated by the act entitled an act legalizing the marriage of persons of color, approved December 14, 1866, (Chapter 1552, Laws,) is not a cohabitation under a customary slave marriage before emancipation. This act, "an act in relation to escheats," approved December 12, 1866, (Chapter 1566, Laws,) and "an act to establish and enforce the marriage relation between persons of color," approved January 11, 1866, (Chapter 1469, Laws,) construed so far as applicable to this case.

Appeal from the Circuit Court for Duval county.

This is an action of ejectment brought by the plaintiffs (the appellants) in the Circuit Court against the defendant, (appellee,) to recover certain lands lying in Duval county, to-wit: Lot 2, and the East half of lot 1, in block 26, in the city of Jacksonville, (according to Hart's map,) and lot 4, in block 23, and lot 111, block 17, in the Villa of Oakland. The defendant filed the plea of "not guilty," and plaintiffs joined issue. There was a trial and verdict for the defendant, and the plaintiffs moved for a new trial on several grounds, and among others that the instruction of the Judge, stated in the opinion, was erroneous.

The testimony for the plaintiffs is to the effect that Sarah and Bernice, who claim as heirs of Joseph Sams, are the children of Amanda who was a *slave,* and Josephus Sams, a *freeman,* who for several years prior to the war lived and acknowledged each other as husband and wife, at Jacksonville, although there was no marriage ceremony performed. That not long after the commencement of the war she left Jacksonville with her owner and went to Lake City, which was within the Confederate lines, and he went to Hilton Head and subsequently to Beaufort, S. C., in the

Federal lines. That he recognized Sarah and Bernice as his children both before and after the war. Josephus and Amanda did not live together after the separation, and when she first met him after the war she had married another person, John Pelote. In the latter part of 1866 or early part of 1867, in Jacksonville, Josephus asked one of the witnesses if he had seen his family, Amanda and her children, and stated that he had come for them. Amanda received one or two letters from him one, two or three months after the war telling her "to come to Beaufort and he would take care of them." Bethel is the husband of Sarah.

There is a written stipulation to the effect that the property was owned by the mother of Josephus, at her death in 1874, and that at that time he took it as her sole heir, and that he was seized and possessed of it at his death in 1878, and it is now in the possession of the defendant, Mollie Sams.

The defendant, Mollie Sams, claims as sole heir of Josephus, as being his widow. There is testimony in her behalf to the effect that Josephus returned to Jacksonville, from South Carolina, without bringing any one with him as his wife, and staid a few weeks, fixing up his home, then returned to South Carolina and brought her back with him as his wife. All this was in the latter part of 1866, or early part of 1867. From this time till his death he lived with her as his wife. On the 22nd of September, 1876, they were married by a minister of the gospel, under a license issued by the Clerk of the Circuit Court. That John Pelote and the said Amanda were married about the spring of 1866; they lived together as man and wife about a year before their marriage, or from the fall of 1865, and so lived for six years after marriage. That Josephus took Mollie to his home at Beaufort, S. C., on February 8, 1865, and lived

with and recognized her as his wife from that time until his death.

The other facts are stated in the opinion of the court.

M. C. Jordan and *John E. Hartridge* for Appellants.

C. P. Cooper and *Fleming & Daniel* for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The Judge of the Circuit Court instructed the jury that a marriage to be valid in this State must be solemnized by a Minister of the Gospel, or a Judge of a Circuit Court, or a Justice of the Peace, or a Notary Public, except in the case of persons of color, coming within the act of December 14, 1866, entitled "an act legalizing the marriage of persons of color" who were living together as husband and wife at the time of the passage of that act. "The children of parents who were not legally husband and wife cannot inherit." This instruction is here alleged for error. There being certainly no statute in this State anterior to the statute approved January 11, 1866, based upon the idea that no marriages shall be valid unless they are solemnized by the officers mentioned in the statute prescribing the manner of entering into the contract, it follows that the above instruction was erroneous, even admitting the constitutionality of that act. Being erroneous, it certainly withdrew from the consideration of the jury all evidence, if any there was, of informal marriage by contract, *"per verba de presenti,"* anterior to January 11, 1866. The opinion of the Supreme Court of the United States, in the case of Meister vs. Moore, 96 U. S., 79, expresses our view of this question, and we repeat here the language of that court, as it is entirely applicable to the question as it arises, and we have stated it in this case under our statutes.

That court says, "that such a contract constitutes a marriage at common law there can be no doubt, in view of the adjudications made in this country, from its earliest settlement to the present day. Marriage is everywhere regarded as a civil contract. Statutes in many of the States, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence they are not within the principle that, where a statute creates a right and provides a remedy for its enforcement, the remedy is exclusive, * * * A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of bans, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common law right to form the marriage relation by words of present assent, and such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity.

It may be that there is no evidence of a common law marriage in this record, but it is contended that there is a recognition by the parties of the existence of the antecedent marital relation between them since emancipation of the mother and before any legal impediment to such recognition existed, and it is eminently proper, whatever may be our opinion of the facts, that the question should be submitted to a jury under instructions not erroneous in their character, and of such nature as to enable the jury to give to the facts such weight as the rules of evidence authorize and require. Where the instructions are erroneous, it is a

delicate matter for this court to give judgment according to the weight of evidence.

Involved in this case is the construction of the several statutes relating to the subject of marriage in this State as well as the determination of the effect of a cohabiting by persons as husband and wife on the part of a freeman of color and a slave woman, as well as the effect of a cohabitation before emancipation, coupled with confirmation by cohabitation or otherwise after emancipation.

While the American courts admit that there is a moral obligation, which natural law imposes, in the relation of husband and wife among slaves, still, as remarked by a learned judge, its legal consequences must flow from the municipal law. This does not recognize the marriages of slaves. 9 Ala., 990; 6 Jones, N. C., 235; 6 Binn., 206, 211; 24 Ala., 719; 2 Dev. & Bat., 117; 30 Tex., 115; 45 Mo., 595; 1 Bush, 62.

Under the then recognized municipal law no property could vest in their issue upon their death. As to these children, however, the status of bastardy, as remarked by Mr. Bishop, (1 Bishop on M. and D., 163,) was as foreign to this institution (slavery) as the status of legitimacy. They had no foul or corrupt blood. The simple fact was that they had no status as to this particular, one way or the other.

Was there any law in force in this State, statutory or otherwise, which gave to this class inheritable blood? We do not think there was, because the condition of legitimacy as stated did not attach to them, and it was necessary that they should not only not be bastards, but that they should be legitimate under the municipal law to inherit under our statutes and the law controlling the subject. We do not doubt, however, that a marriage after emancipation, or a subsequent cohabitation as husband and wife, or any other plainly established assent by both parties to the continued

existence of a marital relation, entered into before emancipation according to the usual form of slave marriages, would operate to render legitimate their children. This assent must be by both parties. Such acts make children of a former slave marriage legitimate. This result, we think, follows from an equitable construction of the statute of this State, rendering children born out of wedlock legitimate, under which a child thus begotten is deemed and held legitimate by a subsequent marriage of the parties as well as by the rules of law announced by the courts of the several States in the disposition of questions concerning slave marriages. 5 Cold., 18; 65 N. C., 537; 45 Mo., 595. Such acts after emancipation ratify their invalid marriage and render their antecedent issue legitimate. A similar principle to this prevails in reference to marriages of persons *non compes,* to infants, and to marriages induced by fraud or duress. In these cases, the antecedent illegal marriage, by consummation in a lucid interval, or by subsequent consent in case of duress, renders the marriage good.

This brings us to the consideration of the several statutes which in argument are brought to our attention and which it is insisted control this case.

The first statute is the "act in relation to escheats." The statute provides, "that whenever, upon the death of any "person of color, seized or possessed of real or personal es- "tate, there are persons in being who would inherit said "property or any portion thereof, under the several statutes "of descent of this State, but who are prevented from so "doing on account of the legal incapacity of said persons of "color to contract marriage in a state of slavery, which "said estate would otherwise escheat to the State, all the "right, title, and interest of the State of Florida is hereby "vested in and waived in favor of those persons who would

"have inherited said estate, if said parties had been com-
"petent to contract marriage.

"That the fact that said parties shall have failed to ob-
"tain a license to marry, or shall have failed to be married
"according to the forms of law, shall in no case affect the
"operation of this act, but the same shall be held to apply
"to all cases wherein the parties were known as husband
"and wife."

This statute is based upon the law as we have announced it, viz: that the issue of slaves did not have inheritable blood.

The effect of this statue is not to impair any marriage, whether it be a slave marriage made good by acts after emancipation or a marriage of enfranchised persons. The statute is based upon the principle that slaves were not competent to contract a marriage, the issue of which would have inheritable blood, and it provides that where the operation of this rule prevents their children, born in slavery, or any other person, from inheriting their estate, and for want of heirs at law their property would go to the State, there the right of the State is vested in such persons then in being, who are prevented by this rule of law from inheriting the property. The view, therefore, that this act contemplates any validity in a slave marriage independent of ratification after emancipation, or that it renders, or attempts to render, the issue of a slave marriage legiimate, is entirely erroneous. There can be no doubt about the construction of this statute. Its language is plain and unequivocal.

It is insisted that this case comes within the provisions of chapter 1552, Laws, being an act entitled an act legalizing the marriage of persons of color, approved December 14, 1866. That act provides, "that in all cases where col-
"ored persons have resided and lived together as husband
"and wife, and have before the world recognized each

"other as husband and wife, they shall be deemed and "taken to be husband and wife, and are so declared to be "by this act as fully and lawfully as if the marriage had "been solemnized by a proper officer legally authorized to "do and perform the same; and all children born of such "parents are hereby legitimized and made heirs of such "parents, and capable of inheriting under the laws of this "State, as though he, she, or they had been born in lawful "wedlock; that all indictments now pending in any of the "courts of this State against persons of color for fornication "and adultery, when they have been living together in the "said relation, shall be abated and dismissed."

This act, and the act in reference to escheats, as well as chapter 1469, being an act to establish and enforce the marriage-relation between persons of color, approved January 11, 1866, being acts in reference to the same subject matter, must be construed together. The last-named act provided in substance that it shall be required of all colored inhabitants of this State, claiming to be living together in the relation of husband and wife, and who have not been joined as such agreeably to the laws regulating the same, and who shall mutually desire to continue in that relation, within nine months from the passage of this act to appear before some person legally authorized to perform the marriage ceremony, and be regularly joined in the holy bonds of matrimony, and if any such person, either male or female, after the expiration of the time limited in this act, shall be found cohabiting as husband and wife, and who have not been so joined together, they and each of them shall be deemed to be guilty of a misdemeanor, and upon conviction, shall be subjected to the pains and penalties prescribed for fornication and adultery. The act provides further, that the issue of the prior cohabitation shall be made legitimate by the act of marriage; that the marriage certificate shall be recorded, and that persons illegally assuming to perform the

marriage ceremony shall be guilty of a misdemeanor. The last section provides that from and after nine months after the pasasge of the act, all laws applicable to or regulating the marriage relation between white persons shall apply to the same relation between the colored population of the State.

A casual examination of these two statutes will show that there is nothing in them in conflict with the act in reference to escheats, which is based upon the idea that the issue of slaves do not possess inheritable blood.

The first act, January 11, 1866, is based upon the erroneous idea that the statute regulating the performance of the rite of marriage, rendered illegal marriages not celebrated according to its provisions, and contemplates that, notwithstanding a previous living together as husband and wife, whether such living was during slavery or since its abolition, a marriage according to the statute was necessary to legalize the issue springing from such cohabitation and recognition of each other as husband and wife, and nine months was fixed as a period in which, by a marriage according to the statute, the issue of the "prior cohabitation" might be *entitled* to the privileges of legitimate offspring.

This statute, according to its terms, subjected to prosecution persons who had in good faith consented to the marriage relation at common law, and an evil which originated from it was the punishment as criminals of persons who, without any actual intent of committing wrong, had assumed and consented to the marriage relation in good faith. Such a statute enforced would have filled the jails of the country with persons subject to the charge of fornication and adultery from an innocent cohabitation as husband and wife. Obviously this was considered an evil, for within three months after this provision went into operation, the act of December 14, 1866, before recited, was passed, by which all in-

dictments then pending under the act of January 11, 1866, were directed to be abated.

Construing these three acts together, relating as they do strictly to the same subject, the marital relations of persons of color, it is evident that the act of December 14, 1866, must, in order to be consistent with the act of December 12, 1866, and of January 11, 1866, be construed to refer to a cohabitation and "recognition" occurring since the emancipation of the slave, because the act of January 11, 1866, is founded upon the idea that cohabitation in the relation of husband and wife did not bestow any marital rights at any time, and the act of December 12, 1866, is based upon the "legal incapacity of persons to contract marriage in a state of slavery." A consistent and harmonious operation of the acts of December 14, 1866, and December 12, 1866, restricts the operation of the act of December 14, 1866, to a living together as husband and wife since emancipation. The language of the act is broad enough to cover a slave marriage, but to give it that construction would bring it in conflict with the express language and operation of the act of December 12, 1866.

It is unnecessary in this case to determine whether the living together contemplated by that act must have been cotemporary with its passage as well as preceding it, as in this case there is not even a pretense of a cohabitation by the parents of appellants *at any time* since the emancipation of their mother, and we have no doubt at all that the Legislature in this act did not refer to a cohabitation as husband and wife incident to a customary slave marriage.

The views expressed cover the errors assigned in every aspect of the testimony, and indicate the extent to which in several respects there was error in the charge of the court.

The judgment is reversed, and the case will be remanded with directions to award a new trial.

JOHN O. MATHEWS, APPELLANT, VS. WILLIAM R. HILLYER, APPELLEE.

1. An affidavit that a judgment, upon which an execution was issued, had been satisfied and discharged before the issuing of the execution, is a sufficient statement that the execution was "issued illegally," within the meaning of the statute. (Th. Dig., 360.)

2. Where a defendant in execution made an affidavit that the judgment was satisfied and discharged by a certain transaction between himself and the plaintiff before the execution issued, and executed the bond required by statute, which was returned into court with the execution by the sheriff, it becomes the duty of the court to hear the proofs of the parties as to the facts stated and "determine thereon;" and it is error to dismiss such affidavit upon motion, (the grounds of which motion are that the same matter has been already adjudicated,) and without evidence being produced or facts admitted by either party, and opportunity given to the parties to be heard thereon.

Appeal from the Circuit Court for Marion county.

The facts of the case are stated in the opinion of the court.

Gary & Dunn and *J. T. Bernard* for Appellant.

Bullock & Reardon for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

This was a proceeding to set aside an execution on the ground of illegality.

Execution was issued from the Circuit Court of Marion county, upon a judgment rendered in favor of appellee against Mathews in the Circuit Court, under which the Sheriff levied upon the land of Mathews.

Mathews then made an affidavit that the execution was illegally issued in this, that the judgment lien had been, before the issuing of the execution, fully satisfied and dis-

charged, by substituting therefor a note and mortgage security by the defendant, Mathews, which the plaintiff had accepted and received in lieu and satisfaction of the judgment, and by reason thereof nothing was legally due on said execution. Mathews also executed a bond with sureties, which was approved by the Sheriff, as required by the act of February 15, 1834. Thomp. Dig., 360.

The appellee then moved to dismiss the affidavit upon the grounds that the issue tendered by the affidavit had already been heard and determined in an equity suit between the same parties for the same cause; that in said quity suit the court, by its decree, denied the relief sought by Mathews, from which decree he appealed, and the appeal is now pending in the Supreme Court, in which no supersedeas had been allowed; and because this proceeding is in contempt of the court of equity and its decree that the execution was valid, and in which an injunction was denied.

The court ordered "that the affidavit herein be dismissed upon the grounds set out in the motion, and that said motion is hereby sustained and allowed; and further, that said William R. Hillyer do have execution against the said John O. Mathews, the affiant, and against James A. Harris and James D. Goss, securiites on the bond in this cause."

From this order this appeal was taken. The appellant assigns the following errors:

1. That the court erred in allowing the motion to dismiss the affidavit of illegality, without proof or hearing *aliunde* of the matetrs alleged, as causes for dismissing the affidavit.

2. That the court erred in dismissing the affidavit without hearing evidence upon the facts and issues alleged in said affidavit.

3. In not hearing and determining the issues tendered by the affidavit.

4. In dismissing the affidavit upon motion merely.

Further errors were assigned, which it is not necessary to consider, in view of the conclusion of the court.

The fact that the judgment had been paid or otherwise satisfied before the issuing of the execution, constitutes an "illegality" in the issuing of execution within the meaning of the statute. (Swinney vs. Watkins, 22 Ga., 570; Tucker vs. Respass, 28 Ga., 613; Hill vs. DeLaunay, 34 Ga., 427; McHenry vs. Watkins, 12 Ill., 233.)

If the judgment had been paid or otherwise satisfied, the issuing of an execution was unauthorized. (Ib.)

According to the case as presented in the record, the affidavit was not dismissed because of any defect in form or substance, but merely upon motion, without hearing evidence as to the facts stated, no facts being admitted. If the facts are as stated in the affidavit, the appellant would be entitled to have the execution recalled or quashed, and upon the affidavit the appellant was entitled to have the facts inquird into and adjudicated.

If there has already been an inquiry before a proper forum, and an adjudication upon the same matter, that is matter to be shown by evidence to be produced upon the hearing. The statute requires that upon the affidavit made and presented, the court shall "determine thereon." This implies that both parties may present the proper proofs bearing upon the facts, and they are entitled to the judgment of the court upon the facts proved or admitted, if the same have not been adjudicated by a court having jurisdiction thereof.

Counsel for appellee insists that the court did receive and consider evidence upon the hearing, but the record and the judgment show that the affidavit was dismissed upon the grounds set out *in the motion,* and that the "hearing" was upon appellee's "motion to dismiss." It does not ap-

pear that any testimony to substantiate or rebut any allegation of fact on either side was heard or considered.

The judgment dismissing the appellant's application must be reversed, and it is so ordered.

MEINHARD, BROTHERS & COMPANY, APPELLANTS, VS. HENRY L. LILIENTHAL, APPELLEE.

Where a plaintiff procures a writ of attachment upon ground stated in his affidavit, that defendant was indebted to the plaintiff upon contract, that the debt was actually due, and that the affiant had reason to believe that the defendant would fraudulently part with his property before judgment could be obtained; and upon defendant denying an oath the several allegations in the affidavit, the issues to be tried, upon application to dissolve the attachment, are: whether defendant was indebted as alleged, and whether the *affiant had reason to believe* that the defendant would fraudulently part with his property, &c.

Where the plaintiff's proofs upon such trial are such as to show that the conduct of the debtor, his manner of conducting his business, transferring loads of goods from his store to his residence, having goods shipped in the name of his clerk, studiously avoiding the creditor or his attorney, and the like, are such as would induce a prudent business man on learning the facts to suspect and believe that defendant would part with his property fraudulently before judgment could be recovered against defendant, and these proofs are not contradicted by defendant's evidence, a verdict in favor of defendant is against the law and the evidence, and should be set aside and new trial granted.

The charge of the court should be confined to the law of the case and to the issues made by the pleadings, so that the jury be not misled, but error cannot be assigned upon an erroneous or immaterial charge, unless excepted to at the proper time.

Appeal from the Circuit Court for Orange county.

The appellants, H. Meinhard and others, partners under

the style of Meinhard, Bros. & Co., were plaintiffs in the Circuit Court. There was no "plea to the action."

The other facts are sufficiently stated in the opinion of the Court.

A. M. Thrasher, Thrasher, Davis & Hampton for Appellants.

John W. Price for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

This was an action of assumpsit commenced by attachment. Defendant traversed the grounds stated in the affidavit upon which the writ issued, and upon trial of this issue, a verdict and judgment were had against the plaintiffs, from which they appealed.

On April 22, 1879, plaintiffs, by their attorney, filed an affidavit alleging the indebtedness of defendant, actually due, upon contract, and that the affiant "has reason to believe that said Lilienthal will fraudulently part with his property before judgment can be recovered against him."

The defendant filed his traverse, denying on oath that he ever entertained an intention or performed an act indicating a purpose of fraudulently carrying away any of his property to injure or defraud his creditors, at and before the issuing of the attachment, or at any other time; that the allegations in said affidavit are untrue in fact, and that the allegations of fraudulent intent on the part of defendant are utterly untrue and without foundation in fact.

Upon the issues joined a trial was had before a jury. A. M. Thrasher, for plaintiffs, testified that he had claims of plaintiffs in his hands against defendant, amounting to seven hundred and forty or fifty dolars, all past due in March last, that defendant admitted that the amount was actually due, that the claims were just, that he was insol-

vent and had no money, and wished plaintiffs to give him indulgence and he would try to pay up in the fall, that if plaintiffs would not press him he would make small payments from time to time. Witness proposed to take a mortgage, but defendant declined on the ground that it would ruin him, and he would not under any circumstances prefer a creditor; said he would go and see his brothers, at Palatka, in a few days, and thought he could borrow of them to pay his creditors in part, and then his creditors would wait till business revived. Defendant, within a day or two afterwards, went to Palatka and remained three or four days, and after he returned continually and studiously avoided witness, although he had promised to call and see him on his return. Just prior to that time, witness saw sacks of corn and bales of hay, which were shipped on the steamboats and received into defendant's store, marked and directed to E. S. White, who was defendant's clerk. Defendant and his clerk sold this merchandise just as they did other goods. The day, or the day after defendant returned from Palatka, defendant caused several loads of goods, provisions, and supplies to be hauled away from his store and carried to his dwelling house. Defendant made no payments as he had promised and shunned and avoided witness, and the hauling off the goods and selling goods that were shipped to his clerk, altogether, aroused his suspicions. Defendant bought goods on credit and sold exclusively for cash, he had not been paying debts, and various other creditors were after their money. Witness was informed that defendant was habitually gambling. He had been doing a "staving business," selling for cash, and yet said he had no money with which to pay creditors. On April 23, the day after the attachment was issued, witness ascertained that defendant had executed two mortgages on his stock of goods, which were put on record, yet he remained in possession selling goods

from his store as usual, and hauled several loads of goods to his house. He kept a store of general merchandise.

Copies of the mortgages given by defendant were put in evidence. These mortgages were respectively for the sum of $913.75, to B. L. & L. Lilienthal, of Palatka, and the sum of $1,265.56 to Abraham Leffler, of Savannah, to secure notes given to those parties dated April 7th, 1879.

This is the substance of the testimony on the part of the plaintiffs. The defendant's clerk, E. S. White, testified that he had never seen defendant make a fraudulent sale of any of his property. He explained that corn and hay were shipped to the store in his name for Lilienthal, because a steamboat captain said he would not bring goods for L., but would bring them for witness. He did not know of goods being sent out of the store, except in the usual course of business; was generally in the store, sometimes absent, had charge of the business; did not know that defendant intended to mortgage the goods; cash sales were sometimes as high as $25 and $50 per day. Defendant did not pay over cash received to the mortgagees, but paid a few small debts about home.

Defendant being sworn, said he had not disposed of his property fraudulently; the mortgages were given to his brothers and brother-in-law, who were his oldest creditors; schedules of property were attached to the mortgages after signing, and I directed White to have them recorded; afterward kept the store open and continued to sell and consume goods as usual until attachment was levied; mortgages cover all my property; did not pay the mortgagees anything from proceeds of sale.

The Judge charged the jury at some length, to the effect that upon this issue plaintiffs must show actual fraud on the part of defendant. The Judge also gave instructions submitted in writing by plaintiffs' counsel.

No part of the charge or instructions was excepted to by

either party while the jury were at the bar. It is proper to remark, however, that the charge and the instructions given do not seem to be pertinent to the case made by the traverse of the affidavit. The cause was submitted to the jury upon the evidence, and upon immaterial and hypothetical propositions regarding questions of fraud in the matter of the mortgages and the sale of mortgaged goods by defendant, and the preferring of creditors.

Whether there was fraud in giving the mortgages was not a question under the issues which the jury were sworn to try. The sole issues before the court and jury were these: whether the defendant owed the plaintiffs as alleged, and whether the *affiant had good reason to believe* that the defendant would part with his property fraudulently, before judgment could be recovered against him.

The proof shows the existence of the past due indebtedness. The defendant upon the trial does not attempt to controvert this fact. The proofs on the part of the plaintiffs show that they were importuning defendant for payment, and he was asking for time and postponing payment, studiously avoiding meeting the plaintiffs' attorney, paying nothing, although daily receiving money; going to Palatka to get money, and afterwards avoiding the affiant, either to pay or explain; receiving goods at the store, consigned in the name of his clerk, and mingling and selling them with his other goods, and hauling "loads" of goods from his store to his dwelling-house.

The defendant's evidence, and that of his clerk, do not contradict one word of the evidence on the part of the plaintiffs. The explanation of the clerk as to the reason why goods were consigned to him for his principal only confirms the testimony of plaintiffs' witness as to the fact.

The testimony on the part of the plaintiffs clearly sustains the affidavit, that the defendant was so managing his business, and so conducting himself, that the affiant had

reason to believe that defendant would fraudulently part with his property to avoid or delay payment of his debts. The facts here shown, and not contradicted, were ample to lead any prudent creditor to the same conclusions. The giving of the mortgages by defendant to his brothers and other relatives were not known to affiant when he made the affidavit, though they had been made and recorded several days before the making of the affidavit, but the fact of giving the mortgages, under the circumstances, justified the affiant's suspicions, and tended to show that defendant was not acting in good faith toward plaintiffs. Whether these mortgages were in fact and in law fraudulent was not a question in this issue, and the jury were doubtless misled by the instructions and charge of the court. We do not consider the charge in our conclusions upon this matter, because no exception was reserved, but we may say that we cannot account for the verdict against the plaintiffs, except that they were led in some way to misapprehend the issues properly before them, and to render a verdict clearly against the facts and the law of the case.

Upon the verdict being rendered the plaintiffs asked that it be set aside and for a new trial, on the ground that the verdict was against the law and against the evidence, and the motion was denied and judgment entered by the court dismissing the attachment.

The judgment dissolving the attachment is reversed, the verdict set aside, and a new trial granted, with costs against the defendant.

SANCHEZ'S ADMINISTRATOR AND ADMINISTRATRIX, APPELLANTS, VS. HUBBARD L. HART, APPELLEE.

An administrator in this State has the right of entry into and the right of possession of the real estate of his intestate, and can maintain ejectment. His right to recover follows his right to rents and profits, and because lands are assets in his hands with a power to cultivate the same. The basis of his action is the title of his intestate. His estate, interest and power, after recovery, is limited by the incidents and duties which the law attaches to him, and with which his possession is surrounded.

Appeal from the Circuit Court for Putnam county.

The facts of the case are stated in the opinion of the court.

E. C. F. Sanchez for Appellants.

This is an action of ejectment brought by the plaintiff for the recovery of a certain lot of land in the town of Palatka, in the possession of, and claimed by the defendant. The defendant demurred to the declaration, upon the grounds that administrators could not maintain ejectment and were not proper parties.

The demurrer was sustained by the court.

Plaintiffs then moved to amend by making the heirs at law parties. This motion was refused by the court.

The court then dismissed the suit, from which order and ruling plaintiff appeals.

I submit upon the part of the plaintiff, to sustain the first ground of error assigned, that under the law of England, the estate descended under the law of primogeniture to the eldest male heir, that upon his death to the next, &c., the title vests in the heir. (Blackstone, 2 Vol., 213, 214.)

In England the heirs are necessary parties to an action of ejectment for realty; here they are not.

By virtue of our statutes, and the duties imposed, and the rights conferred upon administrators, administrators are necessary parties, heirs are not; they may be made parties but are not necessary parties.

That owing to the legislation of our State, "making land assets," &c., in hands of administrators, the heirs taking subject to administration, the right to control and possess is an incident to the assets, &c., &c. As it affects the point here raised, the administrator, for the purposes of this suit, is subrogated to all the rights of the heir and the power incident thereto.

I submit that the administrator in this State does not occupy the relation to the realty that he does in England. That by our statute the realty is declared assets in his hands. (Thomp. Dig., page 202, sec. 2.) This statute declaring it assets, carries with it the power to control, otherwise it could not be administered; this power is incident. (2 Fla. Rep., Gilchrist vs. Filyau, page 94; 3 Fla. Rep., Union Bank vs. Heirs Powell, 175.)

Real estate in the hands of an executor or administrator is liable to execution on judgment. (Thomp. Dig., page 203, sec. 5.)

The statutes provide that the executor or administrator shall be made parties within five years to revive judgment. (Thomp. Dig., page 444, sec. 2.)

That in many of the States administrators have been declared proper parties. (10 Ga., Dean vs. Gray; 3 Mass., 258.)

The statutes provide that when an agreement to convey real estate is made and the person dies, the administrator shall execute the conveyance of the real estate. (Page 213, sec. 1.)

This court has in a late case decided that the adminis-

were proper parties to an action to recover posses-
realty. (See case, heirs of Scott vs. Lloyd, 16 Fla.)
ieir takes subject to the administration, and until
te is fully administered, the administrator has the
and disposition of the property, and is therefore nec-
arty.

the second ground of assignment, I submit that
in be no doubt but that we were entitled to an
ent under our statute of 1861, chap. 1096, sec. 74.
ng that the administrator had no right to bring
then the heirs were proper parties, and the amend-
ould have been allowed; if not necessary, they
tainly not improper parties; they had the right at
come into court, and the court was not authorized
hat there was a want of parties. (1 Fla. Rep., 437;
page 519.)

ng & Daniel for Appellants.

are only two points involved in this appeal:
the administrator the proper party plaintiff in an
it suit when there is nothing in the declaration to
at the estate he is administering is in debt?
the heir in such case is a necessary party, can he
a party by motion under section 74 of the Plead-
l Practice act, chapter 1096, of the Laws of Florida.
ll not be denied that under the common law, the
s the only proper party to maintain ejectment for
lds in fee by his ancestor.
e the testator or intestate dies possessed of real es-
r a term of years his personal representative may
ectment to recover the land. But this right is gen-
onfined to those lands which the testator held for a
years.
may be statutes existing in some of the American

States which authorize the personal representatives of the deceased to recover in ejectment real property, held by the testator or intestate, other than for a term of years, or during the life of another; but usually these latter estates are the only ones which can be recovered by the personal representatives of the deceased. (Tyler on Ejectment, page 178; Adams on Ejectment, page 118, 4th Am. Ed.)

Is there anything in our practice, or have any statutes been enacted to change this rule. We contend not.

The action of ejectment involves necessarily the question of title; it must then be brought by him in whom the title is vested.

"Whenever any person having title to real estate of inheritance shall die intestate as to such estate, it shall descend in parcenary to the male and female kindred." (Thomp. Dig. —, 188.)

The descent does not, as in England, go to the eldest son, but to the kindred in the course prescribed by the statute. In other words, to the heirs.

The title by our law descends to the heirs.

The action of ejectment is to try the title to real estate, and if the better title is shown to recover possession.

What does title mean as applied to real estate? What is the definition? "The means whereby the *owner* of land hath the just possession of his property." (Coke's Lit. 345; 2 Blackstone Com., 345; 1 Ohio, 349.)

Can the administrator be considered the owner of the realty in any proper sense? Has he the right "to enjoy it and to do with it as he pleases?"

The heir then, we submit, is the proper party to contest the title.

But it is contended by the appellants, that the decisions already made by this court are conclusive of the questions under discussion, and to sustain his position cites: Gil—

christ vs. Filyau, 2 Fla., 94; Union Bank vs. Powell, 3 Fla., 175; Scott vs. Lloyd, *et ux.*, 16 Fla., 151.

An examination of them, we think, will show that in none of them were the questions presented which this case presents.

In Gilchrist vs. Flynn, there was no question as to the title, right of entry or possession, the subject of controversy being as to whether an action of debt could be sustained against the heir upon the bond of the ancestor, the court holding that such action did not lie, although the heirs be expressly named.

The reasoning pursued is that by the law of England, the obligee of a bond could sue the heir when he is expressly named in the bond; because as the lands descended to the eldest son, they were not assets in the hands of the administrator for the payment of debts. But our law has changed all this. Lands in Florida descend to the male and female kindred in percenary, and after the personal assets are exhausted lands are assets in the hands of the administrator for the payment of debts. That by our statute of descents the fee is clearly in the heir, so that the inheritance may remain unbroken, yet it is so cast upon him subject to the debts of the intestate, and I may add (says the Judge) "the dower of the widow."

That on the failure of personal assets, the administrator, notwithstanding the title in the heir, may resort to the real estate for the payment of debts. That the statute points out the method which he is to pursue in subjecting the lands to sale, by application to the Probate or Circuit Court, for an order of sale, &c. The court then concludes that the statute has prescribed the method to be pursued in making the lands subject to the debts of the intestate, that method thus pointed out must be pursued, that as it is in derogation of the common law, it destroys the ancient remedy against the lien. The question of title, possession

or the right of possession, did not arise in the case, and was not alluded to. The question was, who should pay a debt? and the court decided the administrator should.

The main question, decided in case of the Union Bank vs. the heirs of Powell, was that the lands being assets in the hands of the administrator for the payment of debts, it is necessary to make the administrator a party in a proceeding by *scire facias,* to subject the lands to the payment of a judgment against the intestate. The course of reasoning is substantially the same as in the case of Gilchrist vs. Filyau.

In neither of those cases is it intimated that the administrator has, by force of the statutes, the right of entry upon, or the possession of real estate. On the contrary, both cases announce the doctrine that upon the death of the ancestor, *the fee vests in the heir,* but he takes it subject to the payment of debts, which may be interpreted to mean that the heir takes the land absolutely in case there are no debts, or in case the personal assets are sufficient to satisfy them.

As to the case in 16 Fla., Scott vs. Lloyd. The administrator or executor may be the proper party in an action from which, by statute, all questions of title are excluded as in the action of unlawful detainer, but we doubt very much if our learned court will hold that the administrator is the proper party to a suit where the title must be established in the plaintiff, and the right of possession under the title so established, and the plaintiff must recover upon his exhibition of title in himself. Now it cannot be said that the administrator has any title in the lands, for the statute which changed his relation to the land is in derogation of the common law and hence it is to be strictly construed, and as it does not pretend to give him any right of possession, it will not be inferred that such was its intention.

The power of the administrator over the lands is:

1. Conditional, in that it depends upon the contingency, which may or may not occur, that the personal assets are insufficient to satisfy the debts. If there are no debts or the personalty is sufficient to satisfy the debts, then he could have no power over the realty and the right of possession would be absolute in the heir or heirs, as the case might be. Surely in such case the administrator could not maintain ejectment.

2. The power of the administrator over the land is limited, and to be exercised *"sub modo."* On the failure of the personal assets he can exercise this power, not as an owner, but as prescribed by the statute, that is to apply for the order of sale, advertise, sell, &c. By this method and by operation of the statute the title is transferred from the heir to the purchaser at the administrator's sale, just as the title to a bankrupt estate is vested in the assignee by the register's deed. It cannot be said that the statute vests any title in the administrator, for he can do no more than to exercise the express statutory power to sell the lands and the judicial proceedings which carry the sale into effect, including his own official action, and the order of the court simply operates to divest the heir of his title, and to confer it on the purchaser. The title does not go out of the heir unto the administrator, and from him to the purchaser. The title then is never in the administrator, and if he has no title, how can he maintain ejectment?

On the other hand, the title descends to the heir subject only to the payment of debts. The title must continue in the heir until it is divested by a sale for the payment of debts; until this occurs, he can maintain ejectment, for until such sale it is always uncertain as to whether the lands will be sold. At all events, until his title is thus divested he is in the condition of one holding a title and entitled to enter, but who had previously encumbered the

lands by mortgage or otherwise. He maintains ejectment because he has the title, although a stranger may hold a lien on the lands to which they may be subjected. If then the title is always in the heir, and never in the administrator, the former can maintain ejectment while the latter cannot.

We submit then that there is nothing in our practice or statutes that alters the common law rule, and the decision in 16 Florida does not conclude the argument; if it does, we respectfully ask for its reconsideration.

To maintain ejectment, the plaintiff must have title at the date of the demise laid in the declaration, and must show title *in himself* at the commencement of the suit, and moreover, ejectment cannot be maintained unless the plaintiff has the legal estate. These propositions cannot be denied.

An administrator cannot in any proper sense be said to have the title or the legal estate; and we say this bearing in mind what may be said as to the signification of the word "title" as used in connection with the action of ejectment.

Possession may by length of time ripen into a title, but unless the estate is in debt the administrator neither has possession, nor the right of possession.

There is nothing in the record in this case to show that the estate of Sanchez is in debt. The form used for the declaration is the one prescribed in the act of 1859, chap. 999; and it is worthy of note that in this form are used the words, "that whereas, the defendant is in possession of a certain tract or parcel of land to which the plaintiff *claims title*," showing that it was never presumed that an administrator could be plaintiff.

If the court holds that an administrator can maintain ejectment, must he not in his declaration set up the facts which entitle him to the possession of the real estate; such

indebtedness of the estate upon which his right is

he administrator was not the proper party, clearly irs could not be made parties on motion. The 74th of Blount's Code is broad, very broad we admit, but oad enough to authorize the making of new parties tion.

JUSTICE WESTCOTT delivered the opinion of the

is an action of ejectment. The declaration is in the prescribed by statute. To the declaration there was urrer. The demurrer was sustained. This action is it by administrators, and the first question presented record is, can an administrator maintain ejectment s State? It must be admitted that at the common xcept as to lands held for a term of years by the in-, the general rule was that he could not maintain ent; and such, we think, from a rather extended nation, is the rule in most of the States of the . It is admitted, however, that it is a matter over the legislative department of the government has y power, and the question here is one of statutory uction.

ler our statute of descents, it is provided that "when-ny person having title to real estate of inheritance lie intestate as to such estate, it shall descend in par-to the male and female kindred." This act was in 1829, and in 1833 another statute was passed provided that "real estate shall be considered assets hands of executors or administrators, and after the al assets are exhausted may be sold under an order ree. * * * * * Provided, that no sale of real shall be made to any greater extent than shall be

necessary to supply the deficiency of personal assets for the payment of the just and lawful debts of the deceased." Under the same act it was provided that "real estate in the hands of an executor or administrator may and shall be equally liable with personal property to an execution existing upon any judgment against such administrator or executor."

Under the statute now in force in this State, chapter 1732, Laws, it is declared in general terms that "real estate shall be considered assets in the hands of an executor or administrator."

The direct question whether an administrator can maintain ejectment in this State has never been decided, but this court in construing the statute of 1833 (1 Fla., 94,) has held that "an action of debt cannot be sustained in this State against the heir upon the bond of the ancestor, although the heir be expressly named." The reason given for this conclusion was that at common law the land descended to the heir, and this action being allowed against the heir, no benefit could accrue to the obligee unless he had execution of the lands descended, and because in England lands were not assets in the hands of the administrator for the payment of debts, while in Florida the heir was not entitled as against a creditor even to the rents and profits since the death of the intestate, and lands were assets in the hands of the administrator subject to be sold, after exhaustion of personal assets, and liable with personal property to an execution upon judgment against the administrator. The rents and profits were held to be incident to the land it being obvious in the view of the court that the law intended that the whole estate should be subject to the payment of debts, and that because lands were assets in the hands of the administrator so long as there were any subject to the debts, the plea of *plene administravit* could not be interposed. In the case referred to this court said: "Lands

may be deemed assets *sub modo* or conditional assets as contended for, but still they come within the purview of the term assets, *which is defined property in the hands of the executor or administrator that is sufficient to make him chargeable to a creditor, legatee or party in distribution, so far as such property extends.*" The italics are by the present court.

In a subsequent case, Union Bank vs. Heirs of Powell, 3 Fla., 175, this court held that upon the death of the ancestor the fee vests in the heir, but he takes it subject to the payment of debts. In the same case the court held that "lands being assets in this State in the hands of the administrator, it was necessary, in a proceeding by *scire facias* against the heirs and terre-tenants, to make the administrator a party, and that it was questionable whether it was necessary to make the heirs and terre-tenants parties to a proceeding by *sci. fa.* to subject the lands.

We have in this State a statute which provides that if the testator or intestate has entered into any written agreement or contract for the conveyance of real estate, the administrator is to execute such conveyance.

Under section 2, chapter 1473, Laws, passed in 1866, we have a legislative interpretation of the then existing statutes as to the right of possession of the lands of an intestate. It provides that administrators, when in their judgment it is necessary and proper to hire labor for the cultivation of the lands of the estates represented by them, are authorized, with the sanction of the Judge of Probate, to hire and employ such laborers and superintendents as shall be necessary for that purpose. Under section 1, chapter 3016, Laws, it is provided that the real estate belonging to an insolvent estate shall, after the suggestion of insolvency, *remain* in the hands of the administrator until *pro rata* distribution of the assets is ordered.

Where the lands cannot be divided fairly among the

heirs, the administrator is given the power to have a sale and distribution of the proceeds. Sec. 6, ch. 1732, Laws.

Upon his petition under certain circumstances lands belonging to solvent estates may be sold in lieu of personal property.

It is impossible to reconcile these decisions and statutes with the view that the heir is entitled to the possession of the real estate as against the administrator, during the settlement of the estate. It is true that the administrator has not the absolute property, nor can he be called a tenant for years or for life, with or without expectation of the fee. He has not the fee. He has, however, the right of entry, and the right to the possession and management of the real estate, in the manner contemplated by law.

We think these statutes give to the administrator the right to take possession of the real estate of the deceased, while the estate is in process of settlement, and that the right of the heir is subordinate to this possession. As a matter of course, the administrator has not an absolute property. He can institute proceedings as authorized, and under them the fee may be passed to a purchaser. We do not think there can be any doubt that an administrator thus entitled to possession can maintain ejectment. (1 Kelly, 541; 1 Blackf., 117; 7 Mich., 350; 16 Wis., 193; 21 Ark., 62; 3 Eng., 48; 24 Ala., 129.)

The Supreme Court of Arkansas, in the case of Menifees, administrators vs. Menifee, et al., (3 Eng., 48,) says: "The statute enacts that lands and tenements shall be assets in the hands of every executor or administrator for the payment of the debts of the testator or intestate. Now, while it is perfectly manifest that the law of descent and distribution casts the inheritance upon the heir, subject to the payment of debts and the widow's dower, it is equally clear that the executor or administrator is the legal representative of the whole estate of the deceased, not taken by

the widow as dower and for the support of herself and family, for the special purpose of collecting and preserving it and satisfying the personal obligations of his testator or intestate, all of which the law makes it his duty to perform, if the estate is sufficient therefor, and to distribute the residue if any. And it cannot be doubted, that the whole of the real estate, exclusive of dower, is charged with the debts of the intestate; and therefore, in the absence of other legal authority, we consider it clear, upon well established legal principles, that the principle would carry with it all incidental rights attached to it, of which character we deem the rents and profits; and although the law does not in express terms declare that the administrator shall have the possession of lands, yet if the lands are, as the statute explicitly declares they shall be, unconditionally and unqualifiedly assets in his hands for the payment of debts, to make them entirely and completely answerable from the death of the intestate, the administrators must, of necessity, have their possession from the heir until debts are satisfied; otherwise, the creditors would lose the intermediate rents and profits, which we cannot believe it was designed should go to the heir, while the estate out of which they spring is subject to the claims of creditors."

The act of 1870, chapter 1732, enacts in general language without any proviso that "real estate shall be assets in the hands of an administrator." The administrator, upon the strength of the intestate's title, whose legal representative he is, has a right of entry and a right to present possession, if the estate that the intestate had is of such character as to be attended by these incidents. It is not essential in an action of ejectment that the plaintiff should have an absolute fee. (Ala. Rep., 351; 3 Stewart and Porter, 197.)

His right to recover, and the basis of his action, is the title of his intestate. His estate interest and power, how-

ever, after such recovery, are limited by the incidents and duties which the law attaches to him, and with which his possession is attended, and a court of law or of equity, as may be appropriate, will, in proper cases, exercise their jurisdiction in order to the due preservation of every interest which an administrator in possession should respect and protect.

Being entitled to the possession and to the control, he is entitled through this remedy to enforce such right.

The cases in 2 and 3 Fla. holding the administrator entitled to the rents and profits after the death of the intestate, virtually settled this question. The Supreme Court of Alabama, in the case of Golding vs. Golding's Admr, 24 Ala., 129, uses this language: "Being thus entitled to all the rents of the premises, the administrator must of necessity be entitled to all the needful remedies to enforce his rights; for when the Legislature conferred the right to the rents accruing on the real estate of the intestate on him, it gave him, by implication, every other right or power necessary to render this right effectual. Among these are included the right to the possession of the lands and the right of action to recover that possession if unlawfully withheld from him." Our statutes do not restric[illegible] the right of the administrator to a sale for the purpose o[illegible] paying debts. Lands are first declared assets in the hand[illegible] of an administrator, and he is given every necessary pow[illegible] in connection with the real estate looking to possession a[illegible] management. If there is a power of sale vested in an e[illegible] executor under a will, and he fails to execute the power, [illegible] administrator *cum testamento annexo* has the right to ha[illegible] a sale. If the court deems a sale of the real estate prefe[illegible] ble to a sale of the personal property, the right and po[illegible] to institute the proceeding is in the administrator; a[illegible] when the lands cannot be equitably divided amongst the heirs, a sale may be had and the funds distributed upon

proceedings instituted by the administrator; and finally, when the administrator, in his judgment, thinks it is necessary and proper to hire labor for the cultivation of the lands of the estate represented by him, he is authorized, with the sanction of the Judge of the County Court, so to do. The Legislature certainly contemplated in all this something more in an administrator than a simple statutory power to sell land after exhaustion of personal assets.

He has the right to the possession for defined purposes. As was remarked by the Supreme Court of Michigan, in the case of Campan vs. Campan and others, 25 Mich., 127 : "The right of an administrator under the statute to the possession of the real estate of his intestate, and the rents and profits thereof pending the settlement of the estate, is not an estate or right of property, nor is it an interest which the administrator can dispose of as such."

In this view the order of the court made in this case denying a motion to make the heir a party to the suit was correct, independent of any question of amendment under the statute. The administrator has the right to the present possession and control, and the heir is not a necessary party plaintiff here.

Something is said in the briefs as to the form of the declaration and the necessity for other averments than those required by statute. The form prescribed by the statute is sufficient in all actions of ejectment, and upon the filing of the plea of not guilty and issue thereon, the case is ready for trial. No special pleas are admissible, unless it be a plea to the jurisdiction, a plea *puis darrein continuance,* or something of that character.

The judgment is reversed and the case remanded for further proceedings.

MATILDA WADE, ET AL., APPELLANTS, VS. MICHAEL J. DOYLE, APPELLEE.

1. In an action of ejectment, pleas under the statute of limitations simply denying the seizin or possession of the plaintiff, his grantor, ancestor, or predecessor, within seven years before the commencement of the action, or the accrual of the right of action, are bad. Upon proof of legal title, any possession not adverse is in subordination to the legal title, and an adverse possession should be set up by their pleas.

2. The act of limitations of February 27, 1872, applied to all rights of action which had accrued in the past as well as to those which would accrue in the future. The case of Spencer vs. McBride, 14 Fla., 403, approved.

3. The saving clause in the statute of 1872 only extends to the persons to whom the title first accrues, and when the statute has once begun to run, it will continue to run without being impeded by any subsequent disability, such as infancy and coverture.

4. Although a demurrer to a replication opens the pleadings and reaches back to the first error committed, yet it cannot be visited upon separate and distinct pleas on which issue has been taken.

5. A bad replication is a good answer to a bad plea.

6. Upon demurrer to replications to several pleas, if one of the pleas which reaches the merits of the suit is pronounced good, there should be final judgment for the defendant. The entry of a default for want of a replication to the plea, after sustaining a demurrer to the replication, is not correct practice.

7. After demurrer to pleas, the court may in its discretion permit the pleas to be withdrawn. The order authorizing the withdrawal is entered on the minutes, but the pleas should not be removed from the files.

8. Under the plea of not guilty in ejectment, evidence to prove adverse possession is admissible and a special plea of the statute of limitations should not be allowed. Special demurrers being abolished in this State, such a plea when filed with the general issue should be struck out on motion or *sua sponte* by the court, as tending to embarrass the trial.

Appeal from the Circuit Court for Orange county.

The facts of the case are stated in the opinion of the court.

E. M. Thompson for Appellants.

Fleming & Daniel and *John W. Price* for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This was an action of ejectment brought by the appellants against the appellee in the Circuit Court of the Seventh Judicial Circuit for Orange county. Plaintiffs, Matilda Wade and others, filed their amended declaration on the 26th of September, A. D. 1878, a summons under the original declaration being served on the 26th day of September, A. D. 1878.

To the declaration the defendant pleaded:

1. The general issue, not guilty.

2. "That neither the plaintiffs, nor their ancestor, predecessor or grantor was seized or possessed of the premises in question within seven years before the commencement of this action."

3. "That neither the plaintiffs, nor their ancestor, predecessor or grantor was seized or possessed of the premises in question within seven years before the accruing of the right of action in respect to which such action is prosecuted."

The plaintiffs took issue upon the first plea.

To the second plea they replied "that their ancestor and predecessor was seized and possessed of the premises described in the declaration within twenty years next before the commencement of this action, and that on the 27th day of February, A. D. 1872, no statute of limitations had barred the plaintiffs' right of action; nor had any statute of limitations barred the plaintiffs' right of action within sixty

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3. "That neither the plaintiffs, nor their ancestor, predecessor or grantor was seized or possessed of the premises in question within seven years before the accruing of the right of action in respect to which such action is prosecuted."

The plaintiffs took issue upon the first plea.

To the second plea they replied "that their ancestor and predecessor was seized and possessed of the premises described in the declaration within twenty years next before the commencement of this action, and that on the 27th day of February, A. D. 1872, no statute of limitations had barred the plaintiffs' right of action; nor had any statute of limitations barred the plaintiffs' right of action within sixty

days from the 27th day of February, A. D. 1872, and that their said action was commenced within seven years from the expiration of the said sixty days after the said 27th day of February, A. D. 1872, and this the plaintiffs are ready to verify."

To the third plea the plaintiffs replied "that their ancestor and predecessor was seized and possessed of the premises within twenty years next before the accruing of the cause of action, in respect to which plaintiffs said action is applicable, and that on the 27th day of February, A. D. 1872, no statute of limitations had barred the accruing of plaintiffs said right of action; nor had any statute of limitations barred the accruing of the plaintiffs said right of action within sixty days from the 27th day of February, A. D. 1872, and that plaintiffs said right of action did accrue within seven years from the expiration of the said sixty days from the said 27th day of February, A. D. 1872, and this the plaintiffs are ready to verify."

For further reply to said second and third pleas the plaintiffs said "that their ancestor and predecessor, the said James Weeks, died in the year 1865; that the plaintiffs were then, and at the time of the decease of their said ancestor and predecessors, minors, under the age of twenty-one years; and that they, the plaintiffs, became of lawful age, and attained the age of twenty-one years, within seven years next before the commencement of this action, and this the plaintiffs are ready to verify."

There was a demurrer to the replication to the second plea, the grounds of demurrer being that the period of twenty years is not, and the period of seven years is, the time prescribed as the limitation to this action; that the plaintiffs are not relieved from the force and effect of the statutory bar, as pleaded by the defendant, because their right of action was not barred on the 27th day of February, 1872, or within sixty days thereafter; that there is

no law or rule of limitation of force in this State, which fixes or prescribes the date traversed in said replication, to-wit: the expiration of sixty days from the 27th day of February, A. D. 1872, as a period from which the statutory bar of seven years shall commence to run; that the replication neither traversed nor confessed and avoided the plea.

The plea here is framed in the language of the act of February 27, 1872. Chapter 1869, Laws.

This is the statute of limitations now in force, and seven years is the limitation under this statute. So much of the replication, therefore, as sets up a limitation of twenty years is no reply to the plea. Nor is it any reply to say that on the 27th day of February, A. D. 1872, no statute of limitations had barred the plaintiff's right of action. The question here is, is the right of action barred *now,* and whether it was barred on the 27th day of February, A. D. 1872, or not, is immaterial. Nor is it material whether any statute had barred the plaintiff's right of action within sixty days from the 27th day of February, A. D. 1872.

The remaining part of this replication is an allegation that this action was commenced within seven years from the expiration of sixty days after the 27th day of February, A. D. 1872. No such limitation is prescribed by the act of 1872.

We had occasion, in the case of Spencer vs. McBride, 14 Fla., 403, to examine this statute and to construe the 19th section thereof. That section does not fix a limitation of seven years after the expiration of sixty days from the date of the passage of the act. The statute provides that no such action as this should be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises within seven years before the commencement of the action. If, however, the limitation fixed by this statute, that is seven years, had expired at the date of its passage, or would expire within

sixty days from its passage, then six months from the 27th February, 1872, was the limitation fixed. That is to say, that in these two classes of cases the 27th of August, A. D. 1872, was the date at which the remedy was barred. This action was brought long after the expiration of that period, and therefore the 19th section of this statute cannot and does not affect it, and the plea of seven years as pleaded is good. For that plea is a good plea in all cases except those embraced in the 19th section, and the antecedent pleadings and proceedings herein, which are reached by the demurrer, show that this action was instituted in the month of September, A. D. 1878.

What is here stated disposes of the replication to the third plea, to which replication there was a demurrer. It is based upon the same erroneous construction of the 19th section of the act of 1872. The third plea here is framed under the third section of the act of 1872. Under this section, except in cases of title derived from the State or the United States, the plaintiff, his ancestor, predecessor, or grantor must have been seized or possessed of the premises within seven years before the accruing of the right of action in respect to which the action is prosecuted, and the replication neither confesses and avoids nor traverses the plea, and what is alleged is no reply to the plea.

To the additional replication to the second and third pleas there was a demurrer. The facts here set up by plaintiffs are, that their ancestor and predecessor died in the year 1865; that they were, at the time of his death, minors under the age of twenty-one years, and that they attained the age of twenty-one years within seven years next before the commencement of this action. This is no reply. The saving clause in the statute of 1872, ch. 1869, sec. 9, Laws, only extends to the persons on whom the right first descends or accrues, and when the statute has once begun to run it will continue to run without being impeded by any

subsequent disability. The statute does not mean that the limitation shall not operate except from the time the right of action accrues to the person laboring under a disability, but to the time when the right *first* accrued to those under whom they derive their right. There is no material difference between our statute and the English statute, the statute of New York, the statute of Wisconsin, and the statutes of other states in this respect. The courts of these States give the construction stated. Under any other construction the assertion of claims might be postponed for the period of the longest life, and possessions disturbed after sixty, eighty, or even an hundred years. 13 John., 513; 1 John., 165; 3 Hill, 85; 39 Wis., 466; 94 U. S., 773.

"The course of decisions in England and in this country has established the rule beyond doubt, that where the statute of limitations has commenced running, it runs over all subsequent disabilities." 2 Green, (N. J.,) 294.

What is said disposes of the matter of these replications. The question whether the pleas are good still remains, for if they are not good in law, the judgment upon the demurrer should have been for the plaintiffs. A bad replication is a good answer to a bad plea. (1 Blackf., 415; 2 Green, Iowa, 184; 4 Munf., 104; 4 G. and J., 395; 32 Ala., 506; 7 How., 706; 1 Barb., 137; 16 Serg. and Raw., 51.) We think the special pleas bad. The statute of 1872, except as to the time of limitation, is similar to the statute of California. The Supreme Court of that State, in Sharp vs. Dangrey, 33 Cal., 605, held that a plea of this character simply denying seizin or possession was bad, and that it should also set up in *proper manner* that the defendant has been for the time stated in the adverse possession of the land. A mere squatter claiming no title, or any person in possession, in subordination to the legal title, whether he knows in whom it is vested or not, cannot acquire title simply because there has been no entry or actual possession

against him for seven years. Under section 4 of our statute the person establishing a legal title has the right of possession and is presumed to be in possession, and unless the actual possession of the other party is adverse for the time of the limitation, it is in contemplation of law a possession, under and in subordination to the legal title. (39 N. Y., 302; 4 Cranch, 367.)

An entry into lands within seven years is not required, unless there be some adversary possession or title to be defeated by such entry. Until there is an actual permanent possession by some claimant as contemplated by the statute, the party to whom the *right* or *title* to the land accrued, cannot prosecute the action. (Tyler on Eject., 807.)

As to the second plea, it is also true that if the plaintiff establishes a legal title in himself, his ancestor, predecessor or grantor, within seven years before the act was committed in respect to which the action is prosecuted, that any other possession than an adverse possession is deemed to be in subordination to that title. For this reason the plea should set up an adverse possession for the period named. The plea is also wanting in certainty. There are no facts alleged by which the date of the accruing of the right of action can be ascertained or put in issue.

For the reasons stated we think the pleas bad, and the result is that the judgment of the court upon defendant's demurrer to the plaintiffs, replications to the second and third pleas was, in our opinion, error. There should have been judgment for the plaintiffs upon the demurrer as to these pleas, and if the pleas had not been amended the plea of the general issue would have remained to be disposed of. Although a demurrer opens the pleadings and reaches back to the first error committed, yet it cannot be visited upon separate and distinct pleas on which issue has been previously taken.

Next in the record appears a demurrer to defendant's

fourth and fifth pleas. There are no such pleas in the record as presented to this court. It appears by a recital in another portion of the record that these pleas, by leave of the court, were withdrawn, and we presume they were taken from the files of the court. This is not correct practice. After a pleading of a party has been replied to by his adversary he may abandon it, but the record should remain as it is. We do not see here, however, where any injury has resulted to appellant, (3 Scam., 15,) and it is certainly no ground for the reversal of a judgment if it be otherwise right. The defendant had a right to abandon these pleas.

In another portion of the record we find an additional replication to the defendant's second and third pleas. This replication consists more of statements of legal propositions, which would have been raised by a demurrer to these pleas, than of facts set up in reply to those stated by defendant in the pleas. The only fact properly alleged in it is that the ancestor of plaintiffs died before the adoption "of the act of limitations of February 27, 1872." To this replication there was a demurrer, and the demurrer was sustained. This is no reply, but as before stated, a bad replication is a good answer to a bad plea, and the judgment upon the demurrer should have been for plaintiffs.

From the record it appears that after the announcement of the court sustaining the demurrer to these replications, no entry of judgment for defendant upon these demurrers was made, but that the court directed an entry of a default for want of a replication to the second and third pleas. Admitting the correctness of the court's ruling upon the demurrer, (which we have said we think was error,) still this entry of a default was wrong. The plaintiffs had not been in default in filing a replication to these pleas. They had filed their replications, defendant had demurred to them, and the court had sustained the demurrer. The

plaintiffs did not ask to amend, and the proper entry to have been made on the minutes of the court was a final judgment for the defendant upon these demurrers. The pleas went to the whole action, and unreplied to, were an answer to it. (14 Wall., 457; 10 Pet., 257.)

We will examine the case further.

After the court permitted the defendant to withdraw his fourth and fifth pleas, and after the entry of the default as stated, the plaintiffs refused to proceed further. A jury was impaneled without their consent, they offered no evidence, but refused so to do, and the court instructed the jury that the plaintiffs, having offered no evidence, the defendant was entitled to a verdict, and there was verdict and judgment for the defendant, followed by a motion for a new trial.

We will notice the motion for a new trial first. This motion is in this language: "The plaintiffs, by their attorneys, move that the verdict in this cause be set aside, and that judgment thereon be arrested." The words, "and that judgment there on be arrested," are improperly here. A judgment is never arrested as a result of setting aside a verdict; a new trial is granted; nor are these terms applicable to a simple stay of proceedings in connection with a motion for new trial if that is what is desired. Arresting a judgment and staying proceedings, as here used, are distinct and different things. A stay of proceedings, so far as authorized by law, (Thomp. Dig., 351,) may be awarded until the motion for new trial is acted upon. An arrest of judgment is independent of the motion for new trial, and if made should be made subsequent to such motion.

We have already stated that a judgment for the defendant upon the demurrer here should have been final, but even if such was not the case and it was necessary that some other issue should have been disposed of, or made, still the proceedings were erroneous.

en though a trial of such an issue was proper, yet as st the wish of the plaintiffs, the defendant cannot cute plaintiff's suit. If the plaintiffs saw proper to lon their cause in this stage of the proceedings, the dent's remedy was a motion for judgment for want of prose-1. While the plaintiff cannot be compelled to sub- o a non-suit, (Rule 51, Circuit Court Rules,) yet if he tarily declines to prosecute his suit and refuses so to he court can and should dispose of it in the manner l.

om what has been said, it is apparent that the judg- in this case must be reversed and set aside, that the ct must be set aside and the case remanded for further edings. No objection having been made to the special in this case, we have examined them as we find them the record.

ıder the plea of not guilty evidence to prove adverse ssion is admissible, though the statute of limitations is pleaded. 94 U. S., 775. Special pleas of this character not admissible at common law, and the statute does nake them so. As remarked by the Supreme Court of sylvania, in Zeigler vs. Fisher, 3 Penn., State, 367, treating of a like statute to ours: "The act declares the plea in ejectment shall be 'not guilty,' thereby re-ıg the issue to one simple plea adapted to the trial of nerits with more facility and certainty."

to common law, so under the statute, there may be al pleas to the jurisdiction or pleas *puis darrein contin-e,* but the pleas here filed are not admissible. 20 Ind., See, also, Tyler on Ejectment, 777 to 792, 464, 465,

nat a special plea amounts to the general issue is an ob-on to the *manner* of the pleading, the matter contained . It may be in substance a good plea and yet subject ttack on this ground. Where special demurrers are al-

lowed, such a demurrer is the proper method of attacking such a plea. 6 S. and M., 88; 20 Ill., 148; 2 N. H., 454.

Special demurrers are abolished in this State, (sec. 15, ch. 1096, Laws,) but the court has power to strike out a plea of this character, (sec. 16, same chapter, Laws,) tending as it does, when filed with the plea of the general issue, to embarrass the trial. 3 Blackf., 256.

Judgment reversed, verdict set aside, and case remanded with directions to strike out all the proceedings after the plea of not guilty, and issue thereon, and for further proceedings conformable to law and not inconsistent with this opinion.

HENRY S. SANFORD, APPELLANT, vs. AARON CLOUD, APPELLEE.

1. That a case is pending in a court of concurrent jurisdiction involving the same matters and seeking the same relief is not ground for continuance of a cause on motion of defendant where there are motions pending to strike out pleas which may and should be determined by the court, and where several continuances had before that time been granted at the instance of the party seeking such continuance. An affidavit for a continuance upon the ground of absence of a material witness must state explicitly and clearly the facts expected to be proved by the witness.

2. The Circuit Courts have both common law and equity powers, but in exercising the different jurisdictions they act as distinct and independent tribunals.

3. The plea of "not guilty" is not applicable to an "action for damages" for breach of covenants, and the defendants should be permitted to withdraw it at all times, if he so desires.

4. To a plea setting up a want of title in the vendor at the time he entered into a contract of sale, it is a good replication that all the matters and things therein set up as a defence were before that

time determined in favor of the plaintiff by a decree in a suit between the same parties, and the decree finds specifically that there was no bad faith, and there was a full and indispensable title in the vendor.

That damages were not awarded, and that a decree cannot be enforced, is not a reply to a plea of *res judicata*.

It is not necessary that the vendor should have a complete, unincumbered title at the time he contracts. It will be sufficient if he will make a good title at the time he agreed to convey. The general allegation in a plea that vendor has not a good title is not sufficient. Vendee must state facts showing exactly where the deficiency is. It is the province of the court to determine what constitutes a good title, and present the question, the facts urged in denial of its existence must be stated by the pleader.

Amending a pleading after it has been pronounced bad on demurrer is a waiver of the demurrer.

The general rule is, that notwithstanding the particular pleading demurred to may be defective, the court will examine all the pleadings in the cause, and render judgment against the party chargeable with the earliest substantial fault in pleading.

Covenants that upon the faithful performance by vendee of the covenants and agreements to be by him performed, and upon the payment of the several sums of money mentioned, and the interest thereon at the times and in the manner and at the place mentioned to the vendor, *that thereupon* the vendor will well and faithfully execute and deliver a good and sufficient deed, and thereby convey a good fee simple title, are dependent covenants. After the expiration of the time for the payment of the last installment and the performance of the last act, the vendee, to have his action for an entire breach, must execute and tender a conveyance in conformity to his contract, and the declaration in the suit must aver such tender. An averment of readiness and willingness to convey is not sufficient.

Where pleas plainly and clearly inconsistent with each other are filed, the court should require the party to elect his defense, and upon his election should strike out the inconsistent plea. The constitution requires all pleas to be sworn to. The court may properly exercise its general power of control over the pleadings under the law to prevent inconsistent pleas. To the extent that this view is in conflict with the provisions of the act of November 23, 1828, regulating judicial proceedings, such act is repealed.

In an action by vendee against vendor, upon an executory contract

for the sale of land, the general rule is that the measure of damages is the purchase money and interest and expense of investigating title. This rule, however, does not apply where there is want of good faith in the vendor shown by his voluntarily conveying the land to another or by any other act inconsistent with the utmost good faith. In such cases, or in cases where vendor had no title, although he acted in good faith, he is liable for the value of the land at the time of the breach, with interest from that date.

Appeal from the Circuit Court for Orange county.

The appellee sued the appellant in the Circuit Court in an action of covenant, and recovered a judgment for $8,400 from which the appeal is taken. The other facts are stated in the opinion of the court.

E. K. Foster, J. W. Price, Fleming & Daniel for Appellant.

St. Clair Abrams & Summerlin for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The first error assigned in this case is the refusal of the court to grant the motion for a continuance heard on the 29th July, A. D. 1879.

The exercise of discretion involved in the determination of this motion, when the action of the court is properly presented by exception in the record, is under the statutes of this State subject to review in this court. The uniform course of action by this court in reviewing the exercise of such a discretion is to require a very clear, plain case of error to sanction the control of the Circuit Court in its action in this respect. 9 Fla., 490; 12 Fla., 562. An appellate tribunal should never, except in a plain case, control discretion of this character in matters of practice, as it has not the opportunity of knowing many things which should, to some extent, control in its exercise, and which the court,

before which the case is tried, knows necessarily. 12 Fla., 571; 12 Grat., 576. In the State of Georgia, where the statute made such action of the court of original jurisdiction the subject of review, the uniform practice of the Supreme Court was not to sustain a writ of error on account of refusal to grant a continuance, unless in a most plain and palpable instance of the arbitrary and oppressive exercise of the discretion necessarily vested by law. 1 Kelly, 215. In view of this rule, which we think is eminently proper, what is the case presented by this record? It is an "action for damages" by vendor in a contract for sale of lands against vendee in possession under such contract, the cause of damage being alleged breach of covenants. For the purpose of disposing of this assignment of error, as well as for considering the other errors assigned, it is essential to show the exact state of the pleadings in the case.

The summons was issued December 20, 1876, and the declaration filed February 5, 1877.

After a demurrer to first declaration by agreement an amended declaration was filed on the 9th day of April, A. D. 1877.

This declaration narrates that plaintiff and defendant entered into a written covenant, under seal, in the words and figures following:

LAND CONTRACT.

"This contract, made this twenty-eighth day of January, in the year of our Lord one thousand eight hundred and seventy-one, between Aaron Cloud, of Orange county, State of Florida, party of the first part, and Henry S. Sanford, party of the second part, witnesseth as follows:

"*First.* The said party of the first part, in consideration of the sum of twenty-five hundred dollars, to be paid to the said party of the first part, and of the covenants to be performed by the said party of the second part as hereinafter expressed, hereby agrees to sell to the said party of the

ond part all that certain tract of land situated in the unty of Orange, in the State of Florida, known and de gnated as lots three and two, in section twenty-five, town hip 19, south, range 30 east, known as the Potter Place and situated on lake Monroe, being about one hundred and fifty-two acres. Reserving, however, to him, the said Aaron Cloud, ten acres of land to be selected by him, being mostly cleared land on said premises, with right of way thereto, with the privileges and appurtenances thereunto belonging.

"*Second.* The said party of the second part, in consideration of the covenants herein contained in behalf of the said party of the first part, agrees to purchase of the said party of the first part the above described lands, and to pay for the same to the said party of the first part, or his legal representatives, the sum of twenty-five hundred dollars and ——cents, lawful money of the United States, in manner following—that is to say, two hundred dollars in cash, the receipt of which is hereby acknowledged, five hundred dollars in a note bearing eight per cent. interest from the first of February, *proximo*, at one year's date, one thousand dollars in a note bearing eight per cent. interest from the first of February, *proximo*, at one year's date, one thousand dollars southeast quarter of northwest quarter of section 36, township 19, south, range 30 east, being about forty acres, and taken as the equivalent of eight hundred dollars, both principal and interest to be paid at Mellonville; and, also, that he will, so long, as any part of the principal and interest of the said consideration money remains unpaid, well and faithfully, in due season, in each and every year, pay or cause to be paid all taxes and assessments, ordinary and extraordinary, that may, for any purpose whatever, be levied or assessed on said premises, or on this contract, and that he will not commit, nor suffer any other person to commit, any waste or damage to the said lands or the appurtenances,

except for fire-wood or otherwise, for his own use, or while clearing off the land for cultivation in the ordinary manner.

"*Third.* The said party of the first part further covenants and agrees with the said party of the second part, that upon the faithful performance by the said party of the second part of the covenants and agreements by him to be performed, and upon the payments of the several sums of money above mentioned, and the interest thereon, at the times, and in the manner, and at the place above mentioned to the said party of the first part, that thereupon the said party of the first part will well and faithfully execute and deliver a good and sufficient deed or deeds, and thereby convey to the said party of the second part, his heirs and assigns, a good and unincumbered title in fee simple to the above described premises, with their appurtenances.

"*Fourth.* It is further mutually convenanted and agreed, by and between the parties hereto, that the said party of the second part may immediately enter on said land, and remain there and cultivate the same as long as he shall fulfil and perform all the agreements hereinbefore mentioned on his part to be fulfilled and performed, and no longer; and that if he shall at any time hereafter violate or neglect to fulfill any of said agreements, he shall forfeit all right or claim under this contract, and be liable to the said party of the first part for damages, and shall also be liable to be removed from the said land in the manner as is provided by law for the removal of a tenant that holds over after the time specified in his lease.

"And it shall be lawful for the said party of the first part, at any time after the violation or non-fulfilment of any of the said agreements on the part of the said party of the second part, to sell and convey the said land, or any part thereof, to any other person whomsoever, and the said party of the first part shall not be liable in any way, nor to any person to refund any part of the money which he may have

second part all that certain tract of land situated in the county of Orange, in the State of Florida, known and designated as lots three and two, in section twenty-five, township 19, south, range 30 east, known as the Potter Place, and situated on lake Monroe, being about one hundred and fifty-two acres. Reserving, however, to him, the said Aaron Cloud, ten acres of land to be selected by him, being mostly cleared land on said premises, with right of way thereto with the privileges and appurtenances thereunto belonging.

"*Second.* The said party of the second part, in consideration of the covenants herein contained in behalf of the said party of the first part, agrees to purchase of the said party of the first part the above described lands, and to pay for the same to the said party of the first part, or his legal representatives, the sum of twenty-five hundred dollars and ——cents, lawful money of the United States, in manner following—that is to say, two hundred dollars in cash, the receipt of which is hereby acknowledged, five hundred dollars in a note bearing eight per cent. interest from the first of February, *proximo*, at one year's date, one thousand dollars in a note bearing eight per cent. interest from the first of February, *proximo*, at one year's date, one thousand dollars southeast quarter of northwest quarter of section 36, township 19, south, range 30 east, being about forty acres, and taken as the equivalent of eight hundred dollars, both principal and interest to be paid at Mellonville; and, also, that he will, so long, as any part of the principal and interest of the said consideration money remains unpaid, well and faithfully, in due season, in each and every year, pay or cause to be paid all taxes and assessments, ordinary and extraordinary, that may, for any purpose whatever, be levied or assessed on said premises, or on this contract, and that he will not commit, nor suffer any other person to commit, any waste or damage to the said lands or the appurtenances,

except for fire-wood or otherwise, for his own use, or while clearing off the land for cultivation in the ordinary manner.

"*Third.* The said party of the first part further covenants and agrees with the said party of the second part, that upon the faithful performance by the said party of the second part of the covenants and agreements by him to be performed, and upon the payments of the several sums of money above mentioned, and the interest thereon, at the times, and in the manner, and at the place above mentioned to the said party of the first part, that thereupon the said party of the first part will well and faithfully execute and deliver a good and sufficient deed or deeds, and thereby convey to the said party of the second part, his heirs and assigns, a good and unincumbered title in fee simple to the above described premises, with their appurtenances.

"*Fourth.* It is further mutually convenanted and agreed, by and between the parties hereto, that the said party of the second part may immediately enter on said land, and remain there and cultivate the same as long as he shall fulfil and perform all the agreements hereinbefore mentioned on his part to be fulfilled and performed, and no longer; and that if he shall at any time hereafter violate or neglect to fulfill any of said agreements, he shall forfeit all right or claim under this contract, and be liable to the said party of the first part for damages, and shall also be liable to be removed from the said land in the manner as is provided by law for the removal of a tenant that holds over after the time specified in his lease.

"And it shall be lawful for the said party of the first part, at any time after the violation or non-fulfilment of any of the said agreements on the part of the said party of the second part, to sell and convey the said land, or any part thereof, to any other person whomsoever, and the said party of the first part shall not be liable in any way, nor to any person to refund any part of the money which he may have

To this order the plaintiff excepted and the ground of exception as stated in the record is as follows:

"The court having declined to hear the above motion until after the determination of the chancery suit of H. S. Sanford vs. Aaron Cloud, plaintiff's counsel excepts to the action of the court.

"WILLIAM ARCHER COCKE, *Judge.*"

On the 28th day of August, A. D. 1879, the motion for a continuance, the ruling upon which is here assigned for error, was made. As the foundation for that motion, an affidavit of defendant's agent to the effect following was filed: That he is the general agent of Henry S. Sanford for the transaction of Mr. Sanford's business in the State of Florida; that the defendant, Henry S. Sanford, came from Beligum, in Europe, to New York city, on his way to Orange county to attend the Spring term of this court, to be held on the 3d Monday in May, A. D. 1879; that the defendant, Henry S. Sanford, is now in Europe, and cannot be in attendance upon the present term of this court; that his presence and testimony is absolutely necessary in the trial of this cause; that he, the affiant, telegraphed to Mr. Sanford that the court had adjourned till the 3d Monday in July, 1879; that subsequently he received a telegram from Mr. Sanford inquiring whether his presence would be necessary at the court to be held in July, 1879; that he replied that it was; that he then received a letter from Mr. Sanford stating that imperative business that he could not defer demanded his presence in Belgium or Europe. That he is informed and believes that the condition of Mr. Sanford's family imperatively required his presence in Europe. That the subject matter of this suit of Aaron Cloud against Henry S. Sanford has been and now is in chancery in a suit between the same parties and the same subject matter before the Judge of the Seventh Judical Circuit of the State of Florida, and that said suit will probably result in disposing

of and adjudicating the whole subject matter of said suit. That a decree for the specific performance of the contract, for the breach of which this suit of Aaron Cloud vs. Henry S. Sanford was brought, was made in said chancery suit, and payment of the said consideration in said contract ordered, with interest thereon; and the decree further ordered that the said Henry S. Sanford make a deed to Aaron Cloud to forty acres of land described in the decree; that the defendant in this action appealed from the decree; of this honorable court and your affiant is informed and believes that said appeal was perfected and argued before the June term of the Supreme Court of the State of Florida. Your affiant is further informed and believes that the Supreme Court adjourned *sine die,* without rendering any decision in the case of Henry S. Sanford vs. Aaron Cloud. [For this decision *vide infra, this volume.*—REPORTER.] Your affiant further states that the result of the decision of the Supreme Court in the appeal before them is essential to a proper determination of this suit of Aaron Cloud and may determine it, and material in determining the damages in the common law suit; that the defendant, Henry S. Sanford, cannot go to trial without the decree or order of the Supreme Court and the presence of Henry S. Sanford, that his evidence may be used; that this is not made for the purpose of delay, but in order that the ends of justice may be obtained.

After argument the motion was overruled and the action of the court was excepted to.

The causes assigned in this affidavit are two: absence of a material witness, that witness being the defendant, and the pendency of a suit between the same parties involving the same subject matter in a court of equity.

We will discuss the sufficiency of the last clause first.

The pendency of a suit in another court, whether it involves the same questions or not, is not a ground for a con-

tinuance of a cause. If it is a cause for the continuance of one it is for the other, and the consequence would be that you would never have a trial in either court. In this case every opportunity for pleading had been afforded the defendant, and he had avoided filing any plea setting up the matter alleged in this affidavit. This is no more a ground for a continuance than an affidavit to payment, or to any other fact which would constitute good ground for plea to the merits. It is true that the Judge, after argument of the motion to strike out certain pleas, in the consideration of which the matter of a stay of proceedings did not necessarily or properly enter, had before this motion for continuance declined to hear that motion until "after the determination of the chancery suit of H. S. Sanford vs. Aaron Cloud," but in the absence of any thing upon the record showing the pendency of that suit, or of anything setting up the matter in proper form of pleading, it was error for the court to award such stay of proceedings, and we presume, from this last ruling upon the motion for a continuance, that the court subsequently took the correct view of the matter and denied the motion. The effect of this action was to put the party to his proper plea if he had any, and it was exactly what the court should have done in the matter. The rule is, unquestionably, that when two courts have concurrent jurisdiction over the same subject matter, the court in which the suit is *first* commenced is entitled to retain it, (1 Mar. Chy., 354; 9 Wheat., 532; 14 Fla., 301,) but the prior pendency of such suit should be made the subject of defence to the action, and not for a simple postponement of its trial. The affidavit here does not state that the chancery suit was first pending. Again, it was apparent that the pleadings were in such condition that further action was necessary before the issues could be made up. There was a motion to strike out certain pleas, which ought to have been determined at once. Consequent upon

the ruling of the court in this matter, it might well have presumed, as was the case, that defendant would ask to amend his pleading by adding new and additional pleas.

But it may be said that the Judge of the Circuit Court and the Chancellor are the same persons, and it is proper for him to act upon his knowledge as Chancellor in the court of common law. This is not the rule. 5 Blackford, 443. In case of an appeal from a common law judgment rendered in a case where a continuance was denied, how could the party have here the benefit of the Chancellor's personal knowledge of the pendency of proceedings between the same parties, and in reference to the same subject matter in a Court of Chancery, unless brought to our attention by proper plea, or in some other recognized method in the common law case?

In addition to this it must be remarked that defendant had already had repeated continuances, and it was time that something should be done.

As to the other ground for continuance, it is defective in several particulars. The preeminent defect in it is a failure to state explicitly and clearly the *facts* expected to be proved by the witness. 9 Fla., 490. As to this error our conclusion is, therefore, that there is no such plain and palpable improper exercise of discretion here as to warrant us in setting aside this judgment. On the contrary, the ruling was right.

On the next day after the motion for continuance was denied, the defendant asked leave to withdraw the plea of not guilty, upon which issue had been joined. The court refused to grant the motion, giving defendant leave, however, to file additional pleas. This action is assigned for error.

We are unable to see what the plea of not guilty has to do with an action of covenant of this character. The general issue in covenant is *non est factum,* and all other de-

fences are to be specially pleaded. Rule 67. While a demurrer would perhaps have been good to such a plea, (4 How., U. S., 143,) still, if the plaintiff does not demur, the defendant should be permitted to withdraw it as being informal and not according to the rules of pleading. 1 Hen. & Mun., 153.

This brings us to the consideration of the rulings of the court upon the pleadings, so far as such consideration is asked by appellants.

The first pleas filed were the plea of not guilty and four equitable pleas. All of the equitable pleas except the first were struck out on motion of the plaintiff, and there was issue upon the plea of not guilty. By leave of the court eleven additional pleas were subsequently filed. There was a demurrer to the 1st, 2d, 3d, 4th, 5th, 6th, 7th, and 10th pleas. This demurrer was sustained except as to the 10th plea. As to this plea, there was no action of the court upon the demurrer to it, nothing is said of it neither in the assignment of errors or in the brief of counsel for appellant, and for this reason it is not considered. The 8th and 9th additional pleas were stricken out on motion. There was a replication to plea number 2 of original pleas. To this replication there was a demurrer. The demurrer was overruled, the defendant declining to plead, and resting on his demurrer.

To the 11th additional plea plaintiff filed a replication, to which defendant demurred. The demurrer was overruled, the defendant declining to plead and resting on his demurrer.

The demurrer to the 7th plea was sustained, with leave to defendant to amend, which he did. To this amended plea there was another demurrer, which was sustained. Defendant having amended his plea after demurrer, the first demurrer was waived, and for this reason the ruling of the court thereon is not presented for consideration here. The

ruling of the court upon the second demurrer to the seventh plea as amended is presented for our consideration. The plaintiff urges here a review of the action of the court only as to the first equitable plea, (number 2 of original pleas,) the 9th and 11th of the additional pleas, and the 7th of the additional pleas.

Number 2 of original pleas is as follows: For a plea on equitable grounds defendant says, that the said plaintiff obtained the agreement entered into by and between the said plaintiff and defendant on the 28th day of January, A. D. 1871, by misrepresentation and fraud in this, that the said plaintiff represented to the said defendant that he owned and possessed the said land named and described in said agreement in fee simple, and had an indefeasible title in and to said land at the time of the making thereof, while in truth and in fact he had no title in or to said land, or any interest therein, for the reason whereof the said plaintiff obtained said agreement by misrepresentation and fraud, by which said agreement became, was and is void from the time of the execution thereof. The replication to this plea was, that the said plea in all of the matters and things therein contained, in manner and form as the same are therein set forth, were heretofore, to-wit., on the 11th day of February, A. D. 1879, by a decree rendered in favor of said plaintiff, Aaron Cloud, against the said defendant, H. S. Sanford, wherein it is decreed "that no bad faith existed at the time of said contract," and it appearing to the court that Cloud had a full and indisputable title, &c., said decree above referred to was rendered by the honorable William Archer Cocke, Judge of the Circuit Court for the Seventh Judicial Circuit in and for Orange county, sitting in Chancery, fully and finally determining and adjudicating all the matters and things set up in said plea. To this replication defendant demurred alleging as grounds of demurrer that, if the decree referred to in said replication fully and finally deter-

mined and adjudicated all the matters and things set up in said plea, it is a full, sufficient, and complete defence to this action, and that the replication is otherwise bad in substance. Considering the matter strictly with reference to the sufficiency of this replication as an answer to the plea, we cannot perceive the error here. Defendant pleads that at the time the contract was made plaintiff did not have a good title to the land as to which the agreement was made, and that plaintiff represented to him that he did have such title. If this be a good plea, then certainly a reply that the matter of his title to this land has been adjudicated in a case between himself and plaintiff, and that it was finally decreed therein that the plaintiff had a good title, and that there was no bad faith on his part at the time of entering into this contract, is a good replication to this plea. We do not determine whether this is or is not proper subject matter for an equitable plea. Our view is, that if such be the case, then a replication that the *equity* set up has been determined against the plea by *a court of equity,* in a case between the same parties and involving the precise question, is a good reply.

The eleventh additional plea was as follows: For a further plea defendant says, that the plaintiff heretofore, to-wit: on the 11th day of February, A. D. 1879, and since the last continuance of this cause, obtained from his Honor, William Archer Cocke, Judge, a final decree in a suit then pending in said court before said Judge, sitting as a chancellor, between the parties in this action and upon said contract, by which decree said Judge has fully, finally, and completely adjudicated and determined all matters in issue between the parties to this action arising out of or incident to this contract, and that said final decree is in full force and unsatisfied.

Plaintiff's replication to this plea "denies that the decree obtained on the 11th day of February, A. D. 1879, from

ruling of the court upon the second demurrer to the seventh plea as amended is presented for our consideration. The plaintiff urges here a review of the action of the court only as to the first equitable plea, (number 2 of original pleas,) the 9th and 11th of the additional pleas, and the 7th of the additional pleas.

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tion of the plea, then the failure of a court to award them is as much an adjudication of the question as a decree awarding them would be, unless the failure resulted from a want of jurisdiction. That perhaps might make a difference but there is no such allegation. Nor can the plaintiff here allege that a decree is erroneous, or of such character that the defendant cannot perform it. That was a matter for the consideration of the court granting the decree. As between the parties, according to these pleadings, it is a final adjudication of the rights springing out of this contract, and in this suit cannot be collaterally assailed by either of the persons who were parties to it. *"Res judicata facit ex albo nigrum, ex nigro album, ex curvo rectum, ex recto curvum."* If anything has happened affecting this decree since it was rendered, and the plaintiff makes a case by amendment, as a matter of course the court, upon the remanding of this cause, should permit it to be made the subject of proper pleading.

The seventh plea as amended was as follows: "That the plaintiff obtained the contract entered into on the 28th day of January, A. D. 1871, by and between the said plaintiff and defendant, by misrepresentation, deception and fraud in this, that the said plaintiff represented to the defendant at and before the signing, sealing, and delivery of the said contract, that he, the plaintiff, had a good and unincumbered title in fee simple in and to the said tract of land described title in fee simple in and to the said tract of land described section 25, township 19, south, range 30 east, while in truth and in fact the plaintiff at the time aforesaid had not, and well knew that he had not, a good and unincumbered title in and to said tract of land, or any part thereof, which was not known to the defendant, by reason whereof the defendant was then and there deceived and induced by the plaintiff by fraud and deception to execute said contract, and

said contract then and there became and is absolutely null and void."

To this plea there was a demurrer, the grounds of which were, that it does not specifically and fully set up the facts constituting the alleged fraud, and that it does not set up a defence to the action.

This is not a good plea. The contract of plaintiff was, that upon the performance of the covenants by defendant, he would execute and deliver a good and sufficient deed, and thereby convey a good and unincumbered title in fee simple. This is his covenant, and if he is able to comply according to this covenant that is sufficient. Mr. Chief Justice Sharkey, speaking for the high court of errors and appeals of Mississippi, (1 How., 346,) of a plea in substance like this says: "It does not, in point of fact, amount necessarily to fraud that Newman had not at the time of sale 'a good indefeasible, and unincumbered title.' It is not pretended that it was a part of the contract that titles should pass on the day of sale, and it was therefore immaterial whether Newman had at that time an unincumbered title or not. If he was prepared to make such a title as he contracted for at the time he undertook to convey, it is all that the defendant had a right to require. Numerous authorities might be cited to show that it is not necessary that the vendor should have a complete, unincumbered title at the time he contracts; if he is able to convey at the time he has designed to do so it is sufficient. (9 John., 126.) In addition to this, the bare, naked allegation of a want of title, even when it is a good plea, is not sufficient." The facts must be fully stated. (23 Ark., 147; 10 Mo., 266.)

What is here said disposes of the ninth plea.

We have thus disposed of the questions arising upon the pleadings, as called to our attention (that is, in view of the sufficiency of the declaration,) by defendant's counsel. We think, however, that there is a fatal defect in the pleadings

they stand, no cause of action being, in our judgment, t up in the declaration. Upon defendant's demurrers to ne pleadings of the plaintiff, as well as upon plaintiff's lemurrers to defendant's pleas, the sufficiency of the amend- ed declaration was involved, and hence the judgment should have been for defendant in either case. 10 Fla., 110.

If the covenants in this case are dependent, then the averment in the declaration that the "plaintiff has always been ready and willing to perform his part of the contract, at the time and in the manner set forth in said contract, as soon as the defendant performed his covenants, as set forth in the contract," is not sufficient. In such case he must aver a tender of the deed. (20 John., 135; 2 John., 209; 10 John., 266; 1 Pet., 465.) In the case of Parker vs. Parmele, 20 John., 135, which was a case of dependent covenants, the court says: "The question arises whether the plaintiff, the vendor, can maintain this action without an actual tender or offer to convey. The averment in the declaration is only that he was ready and willing to convey." The court held this insufficient, and that the declaration was defective in not averring a tender. Is this a case of dependent covenants? This contract was executed the 8th of January, A. D. 1871, vendee going into possession, and agreeing to pay $200 cash; to give a note for $500, payable February 1, 1872; a note for $1,000, payable February 1, 1873, and a deed of forty acres of land. The contract does not state when the deed was to be executed, but the reasonable construction is that it was to be executed when the last payment was made. The contract then provides that upon the faithful performance by the said party of the second part of the covenant and agreements to be by him performed, and upon the payments of the several sums of money above mentioned, and the interest thereon at the times, and in the manner, and at the place mentioned to the said party of the first part; that thereupon the said party of the first

rt will well and faithfully execute and deliver a good
l sufficient deed, and thereby convey a good fee simple
le. The breach here assigned is a total breach—is a
ach of all covenants upon the part of the vendee. In
h case the rule is that the plaintiff is bound to declare
though the action had been brought for the last install-
nt of money payable, and for failure to perform the last
agreed to be done, and that rule is that he must aver a
der of a deed when the last payment or the last act to
performed was to be concurrent with the execution of
deed by him, and that, in our opinion, is this case. The
tract is that upon the performance of the covenants by
vendee, thereupon the vendor shall execute the deed,
As remarked by Fort, J., in Grant vs. Johnson, 1 Sel-
, 255, "so many decisions have been made on the vexed
stion of what are and what are not dependent cove-
nts, and so many of them are irreconcilable (see 10 John.,
3,) that they rather perplex than aid the judgment in
ermining a given case. One rule is universal, and that
that the intent of the parties is to control." The ques-
n here is whether vendee and vendor in this contract
pected that the vendee should depend upon his remedy
action to have this contract enforced after a performance
him of his covenants, or whether they did not expect
t upon vendee's complying with his agreement vendor
uld then and there at once give him a good title. In other
rds, were these not to be practically concurrent acts? This
we think, clearly the effect of the language, and such is
o the result of an application of the principles announced
like cases by the courts. In Johnson vs. Wygant, 11
nd., 48, "the defendant" (as stated by Mr. Justice
therland) "covenanted to pay the plaintiff for the land,"
three equal annual payments; "*'and upon the payment
reof,* (the covenant proceeds,) *I am to receive a good war-
tee deed of said land.'* The payment of the money of

the last installment, and the giving of the deed, were to be concurrent acts. It is well settled that covenants like these are dependent, and that neither party can recover against the other without averring a tender of performance on his part." See also 20 John., 130; Ib., 27; 1 Sugden on Vend., 297.

Covenants are always considered dependent unless the contrary intention appears. The correct rule upon the subject is, we think, announced by the Supreme Court of the United States in the Bank of Columbus vs. Hagner, 1 Peters, 464. That court there says: "In contracts of this description, the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction would, in many cases, lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he paid it. Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent; yet it is evident the inclination of courts has strongly favored the latter construction, as being obviously the most just. The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return; hence, in such cases, if either a vendor or a vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal. And an averment to that effect is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof." The language in this case is, that upon vendee doing certain acts, thereupon vendor will

make a deed, &c. The acts were to concur and were dependent. Neither of the parties here, after a full performance by himself, expected or agreed to rely upon his remedy against the other.

The defendant in this case has filed pleas plainly inconsistent with each other, pleading no consideration and a failure of consideration. The Constitution, sec. 12, Art. VI, requires that all pleas shall be sworn to. We are satisfied that one of the purposes of the convention in ordaining this clause was to prevent just such practice as has been resorted to in this case, and wherever it plainly appears that a defendant has sworn to inconsistent pleas, the court may and should require the defendant to elect his defense, and upon such election should strike out the other inconsistent plea. The court may properly exercise its general power of control over the pleadings to this end. To the extent that the statute authorizing inconsistent defenses is in conflict with these views it is repealed.

In the event of amendment of the declaration after demurrer is sustained, as well as issues upon those pleadings pronounced good in this cause as pleas or replications, a new trial will have to be had. In this view it is not deemed proper for us to examine the testimony in this cause.

As the matter is involved in this case, and as it will be necessary to have it passed upon by the jury in the event a case is made by amendment, we deem it proper to state the rule of damages applicable to actions by vendee against vendor for breach of covenant to convey land.

In general he is entitled to purchase money and interest, but this rule does not apply where there is want of good faith of the vendor, shown by his voluntarily conveying the land to another, or by other act inconsistent with the utmost good faith. In such case, or in cases where vendor had no title, although he acted in good faith, he is liable for the value of the land at the time of the breach, with interest on

such value from that time. In cases where vendor is not subject to pay damages on account of the loss of the bargain, vendee may recover, in addition to the price, expenses of a certain character, such as expenses for investigating the title. 1 Bing, N. C., 492; Measure of Damages, by Sedgwick, sec. 184.

A party who, having no title to land, undertakes to convey, or having no authority to sell makes a contract of sale, or having made such a contract, and having the power to perform it, wilfully neglects or refuses to perform it, is not regarded as entitled to the presumption that he acts in good faith, and is put on the same ground as to his legal liability with one who is guilty of actual fraud, (Measure of Damages, by Sedgwick, section 185, note,) and that liability is for value at the time of breach, and interest thereon.

To sum up on the pleadings presented for our consideration by appellant, we do not think that plea number two, original, was a good plea, but a bad plea is a sufficient answer to a bad declaration; hence the judgment upon demurrer to replication to second original plea should have been for defendant, with leave to parties to amend. The eleventh plea was a good plea even with the declaration amended by setting up a tender and profert, and the replication to it was insufficient, hence there should have been a judgment for defendant, with leave to amend by filing new replication or otherwise. The seventh plea as amended was not a good plea, but a bad plea is an answer to a bad declaration; hence plaintiff's demurrer to this plea should have been overruled, with leave to amend.

The judgment in this case will be that the judgment is reversed, that the verdict is set aside, that the order overruling defendant's demurrer to plaintiff's replication to second original plea is reversed and set aside, that the order overruling defendant's demurrer to plaintiff's replication to eleventh plea is reversed and set aside, that the order

sustaining plaintiff's demurrer to amend seventh plea is reversed, and the case is remanded for further proceedings not inconsistent with this opinion, and conformable to law.

WILLIAM SEDGWICK, PLAINTIFF AND APPELLANT, VS. DEWITT C. DAWKINS, DEFENDANT AND RESPONDENT.

Every paper considered by the Circuit Court in its action, whether it was properly considered or not, should be in the return to this court. A *certiorari* will be awarded to bring up evidence alleged to have been considered upon a motion in arrest of judgment.

Appeal from the Circuit Court for Duval county.

This is a Code case. The respondent suggested diminution, and moved for a *certiorari* to the Circuit Court to send up certain papers not appearing in the record on file in the Supreme Court. The appellant opposed the motion on the ground that the papers desired were improperly considered by the Circuit Court.

C. P. Cooper for motion.

H. Bisbee, Jr., contra.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

Upon preliminary motions based upon affidavit and suggestion, it is not usual or generally proper for the court to enter into any discussion of questions, which the return discloses are there to be discussed and decided upon the hearing. This is purely and essentially a preliminary motion of this character. The respondent here alleges under oath

that the papers sought to be added to the return now on file were, at the time of trial, and still remain on file in the Circuit Court. He also alleges that these papers were to a great extent the basis of the action of the Circuit Court in reaching the conclusion it did, and the return here shows that they were considered. Admitting, for the purpose of disposing of this motion, that the papers here sought to be brought up are such that could not, according to the rules which should have governed the action of the court, have been considered in its action, still, if it is apparent that such papers were considered, then it is evident that we must have them in the record in order to a full and fair review of the action of the Circuit Court.

The error here assigned is the consideration of matters of evidence upon a motion in arrest of judgment, and in the determination of this question it is proper that such evidence should be in the return made to this court.

The *certiorari* is awarded returnable on Friday morning next.

WILLIAM SEDGWICK, PLAINTIFF AND APPELLANT, VS. DE- E- WITT C. DAWKINS, DEFENDANT AND RESPONDENT.

An appeal will be dismissed at any time during the term, if it is discovered in a case at law that there is no final judgment in the record.

Appeal from the Circuit Court for Duval county.

This is a Code case. There was a motion by defendant in arrest of judgment. The entry on the motion docket granting the motion and appealed from is in the following words: "Motion granted, plaintiff excepts and gives notice in open

court of intention to appeal, Wm. Archer Cocke, Judge." and is dated.

The facts of the case are stated in the opinion of the court.

DeWitt C. Dawkins, in pro per.

THE CHIEF JUSTICE delivered the opinion of the court.

After the rendition of judgment of reversal in this cause, and during the same term of the court, the appellee moved for a rehearing upon the ground, among others, that there was no final judgment. Upon examination it was found that the counsel for appellee had entered a motion to dismiss the appeal, which had been by him withdrawn, and subsequently submitted the cause upon the merits on briefs filed, in which briefs no notice was taken of the fact that judgment had not been entered in due form. Upon a subsequent examination of the record it was discovered that no judgment in proper form was embodied in the record, whereupon the judgment of this court was vacated, and the appeal was dismissed.

An order was entered denying the petition for rehearing and dismissing the appeal.

HENRY S. SANFORD, APPELLANT, VS. AARON CLOUD, APPELLEE.

1. A party in possession of land, seeking to set aside a contract of purchase of such land which he has made with another person, as a cloud upon his title otherwise acquired, must clearly establish his

own title before he can have such relief. Equitable relief of this character is granted only in cases of clear title in the plaintiff.

2. Under the statute of limitations, in force in this State from 1850 to December 13, 1861, seven years' possession by a defendant, and those under whom he holds, adverse to plaintiff, and those under whom he holds, no legal disability operating to suspend the statute being shown, vests a good possessory title in the defendant as against the plaintiff and his grantors.

3. A claim under a patent issued by the United States at a time when there was no title in the United States, is a sufficient claim of title. In such cases, it is not necessary that here should tbe a rightful title or a good conveyance, nor is it necessary under the statute of limitations of 1848, that title should be claimed under a written contract.

4. Fraud cannot be inferred from evidence consistent with simple error or mistake of fact in representations made by one party to another.

5. A party having the right to enter into possession of land, and agreeing to so enter in a contract of purchase based upon an acknowledgement of title in another, and obtaining possession so far as this party is concerned under such agreement, is estopped from referring his possession to rights acquired under a conveyance by a thrid party to him. A party thus entitled to possession, or thus in possession, acquiring an oustanding title, holds it in trust and not for his own benefit.

6. Upon a bill by a vendee in possession under an agreement to purchase seeking to set aside such contract of sale as a cloud upon his title otherwise acquired, the defendant vendor cannot have a decree for specific performance of the contract without cross bill.

7. Upon a bill seeking cancellation of an agreement of sale upon the ground of fraud, where the whole structure of the case is based upon a repudiation of the contract, and the prayer of the bill is of this character, it not being proper to make any decree looking to the enforcement of the rights existing under the contract, this court should not declare such rights, but should direct the bill to be dismissed.

Appeal from the Circuit Court for Orange county.

The facts of the case are stated in the opinion of the court.

W. K. Foster, J. W. Price, Fleming & Daniel for Appellant.

The case may be so presented that all the points of appeal may be included in the discussions without reference to each in their order.

Did the court have the right to decree specific performance upon a prayer for the same in the answer, or should it have refused to do so unless it were asked for in a cross bill after time allowed to file the same?

We hold that he could not decree specific performance upon prayer for the same in answer, and in support we quote: "When a bill is filed to set aside an agreement or conveyance, the conveyance cannot be established without a cross bill filed by the defendant." If specific performance could not be decreed under the pleadings, then the contract should have been rescinded, if the allegations of the bill were sustained by the evidence. We claim they were sustained.

The first question to be determined is, did Cloud have such a title as would have permitted him to give the deed he bound himself to give by the contract?

We think he did not. He sets up in his answer that he held through Constant Potter, and exhibits a deed from Constant Potter to himself. (Record, page 86, "exhibit A.") That deed describes the lands as being the same conveyed to Potter by the United States, by patent dated June 28, 1850. This deed of Potter is without the relinquishment of dower by Potter's wife. The next exhibit by Cloud is exhibit B. 3 Daniel's Chan. Plead. and Practice, 3 Am. Ed., top page, 1650; 11 Wheaton, 446; 2 Madd. Chan., 329; 2 Atk., 133; 1 Ball & Beatty, 217; 2 Cox, 78.

As to the necessity of a cross bill for affirmative relief, beg to leave to refer to the case of Wooten vs. Bellinger &

Davis, recently decided by this court, and the authorities there cited.

This is the general rule. Mr. Tyler, in note 1, page 179, of Mitford & Tyler, Plead. and Prac. in Equity, refers to an exceptional instance. This note is as follows: "There is an instance, however, in which this court will, it seems, contrary to the old practice, give the benefit of a cross bill to a defendant upon his answer, namely: when the original bill is for specific performance, and he proves an agreement different from that insisted upon by the plaintiff, and submits to perform the same, for, in such case, if the court decide in favor of that stated by the defendant, it will decree the same to be executed." Fife vs. Clayton, 13 Ves., 546; 15 Ves., 525; page 88 of the Record. This is a patent of the United States to Constant Potter under the armed occupation act.

The foregoing is the entire title of Cloud as it appeared of record at the time of the contract.

The deed of Potter was without relinquishment of dower, and the United States patent was cancelled, as appears by exhibit B, page of record 172.

In the contract time was taken and deemed as the ver essence of the contract, yet Cloud does not obtain relin quishment of dower until over one year after the perform ance on Sanford's part became due.

The patent being cancelled, the title fell to the groun d, unless Cloud and his grantor could claim through Finn e- gan. Cloud procured a quit claim deed from Finneg an about one year after he had entered into the contract wi th Sanford. Did Finnegan have the title at that time? H e, Finnegan, had previously conveyed by warrantee deed to Sanford the grant which included the land described by the numbers in the contract. In such deed were except ed lands conveyed to the heirs of Constant Potter, but those lands were not described at all by numbers, metes, and

bounds, or any other description sufficiently definite to legally distinguish them. He subsequently quit claimed to Sanford, prior to the deed to Cloud, all right of himself in the lands contained within the Levy grant except what had been previously conveyed, no further description to the land being given.

We urge that the exceptions in the deed being so indefinite, the whole land conveyed, which included the exceptions, became the grantee's, carrying the exceptions with them. Mooney vs. Cooledge, 30 Ark., 640.

If the appellants are correct in that position, then the title had passed from Finnegan to Sanford, and could not be conveyed to Cloud.

Evidence taken to show that for a series of years Finnegan had in all mortgages which he gave to parties excepted the land of Potter's, but we contend that no description was ever made that carried anything definite.

An effort was made to establish the "Potter Place," as it was called, but we think the court erred in allowing parol testimony in that point of description, and that which was allowed was not sufficient to enable the chancellor to find what land was Constant Potter's, and therefore Cloud's. We therefore urge that the chancellor erred in deciding from the evidence that Cloud had, at the time of the making of the contract, the equitable and legal title to the land described in the contract, and claim that the evidence goes to show that the legal and equitable title was not in Cloud.

We think that the court erred also in admitting the power-of-attorney made by Potter to Finnegan; that under the laws of the United States governing the settlements under the armed occupation act, no such instrument could be made prior to the issuing of the patent.

The 12th point of appeal is that the court erred in ordering that Henry S. Sanford "do make a deed to Aaron Cloud to a certain piece and parcel of land, described in said con-

tract as the southeast quarter of the northwest quarter of section 36, township 19 south, of range 30 east, being about forty acres, which was taken in the equivalent of eight hundred."

No allegation of mistake in the numbers appears in the complainant's bill, but the respondent puts in evidence that Mr. Sanford had, after the signing of the contract, sold or transferred the same to other parties. Mr. Sanford's testimony shows that he considered it an error in numbers. The complainant shows by parol testimony that the land sold was contracted for by other parties to the contract with Cloud, and the complainant also shows that Cloud himself told Humphreys that it was a mistake. But, as before stated, no allegation of mistake is made, but the evidence was sufficient to satisfy the chancellor that specific performance, as to that deed, was out of the power of the complainant, and if he attempted to decree the equities, he should have ascertained the value, &c., sufficiently for him to have properly decreed.

The 16th ground of appeal is that the court erred in not granting an injunction to stay the proceedings at law as prayed by said bill.

If the chancellor attempted to decree specific performance, he should have restrained the proceedings at law at least until satisfied that it was out of his power to settle the whole matter in equity.

It is also insisted by the appellants that the chancellor, if he had the power to decree specific performance, should at the same time have allowed something to the complainant for his damage, and that interest should not have been run against the complainant prior to the time that the respondent, Cloud, was able to give good title.

That it was some three years before he removed the incumbrance of dower, and until the bringing of the com-

plainant's bill was not in condition to make a good and sufficient deed.

It may be argued that, if the court could not decree specific performance except under a cross bill, that the bill should be dismissed, and the parties left to their rights under the law.

We think not. We believe that the chancery side of the court should determine and settle the relations of the parties.

Fry on Specific Performance and Contracts, section 778, note 1.

St. Clair Abrams & Summerlin and Boling Baker for Appellee.

The complainant was not entitled to a rescision, because he had not sought to cancel the contract within a reasonable time. According to his own showing he discovered the alleged "misrepresentation, covin and fraud," within four months after the execution of the contract, and yet he did not move to rescind for nearly six years after, and during this period he remained in possession of the land, and never even offered to return it to Cloud. * * * He must therefore be regarded as having assented to the contract in spite of the alleged discovery. Barefield vs. Price, 40 Cal.; Morgan vs. N. O. R. R. Co., 2 Wood, 244; Sadler et al., vs. Robinson, 2 Stew., Ala., 523; Desbrow vs. Jones, (How.) Mich., 104; Agros vs. Mitchell, 11 Miss., Smead and M., 683.

He who seeks equity must do equity. The record shows that Sanford had not put himself in a position to seek equity before bringing the bill. He does not show an offer on his part to perform the contract; he does not offer to return the possession of the land to Cloud. He does not show such performance on his part, or tender, as to put

in a position to demand title. (Mitchell vs. Sherwood, Freeman, Ch., Miss., 120. See also Estep vs. Sstep, 23 d., 114; Miller vs. Farson, 17 Wis., 624; Elwood vs. anier, 27 Md., and others,) where it is laid down that a endee cannot retain the land and defend for want of title. He was not entitled to rescision unless evicted by titles paramount. He was in undisputed possession of the land under a contract, and had been tendered a deed if he would comply with the conditions precedent. He was not entitled to any equitable relief on account of outstanding adverse title. He could only rescind if evicted or if danger existed of his eviction. Anderson vs. Lincoln, 6 Miss., (5 How.,) 284; Davis vs. Jelks, 13 La. Ann., 432; Love vs. Watkins, 40 Cal., 692. In the absence of fraud or eviction the vendee of real estate, in possession, * * * is entitled to no equitable relief on account of outstanding encumbrances or adverse title. Eliott vs. Thompson, 4 Humph., (Tenn.,) 9. If ever there had been an outstanding legal title he would not have been entitled to rescind. It is a well settled general rule that when a purchaser has been put in possession, he cannot afterwards acquire a title and set it up in opposition to the vendor. * * All he can claim is the money paid out. Henderson vs. Cowen, 18 Miss., (S. & M.,) 486; Ward vs. Pery, 1 Barb., N. Y., 114; Kemley vs. Crane, 34 Pa. St., 146.

The record shows that even if the legal title vested in Finnegan, the equitable title vested in Cloud through Potter, and that Sanford knew of this equitable title. When, therefore, he purchased from Finnegan it could only have been as trustee for Cloud.

Furthermore, by purchasing the outstanding legal title, Sanford, by his own acts, had precluded Cloud from complying with his part of the contract, hence he had no right to rescind for a cause which he had himself produced. Chit on Contracts, 738.

If Cloud had brought suit for the purchase money he could not have defeated him by pleading the vendor's want of title. (Fowler vs. Smith, 2 Cal., 39,) or by purchasing the outstanding title. (Ash vs. Halden, 36 Me., 163.)

Sanford is estopped to question Cloud's title to the land. It is a well settled principle that a person coming into possession under an executory contract of purchase, is estopped from setting up an outstanding older title against his vendor. Hambleton vs. Taylor, Litt., Ky., Select Cases, 444; Chiles vs. James, 4 Dana, Ky., 479; Washbun on Real Real Property, 3rd Eddition, Vol. 3, page 85, and cases cited; 12 Barb, N. Y., 352; Riley vs. Milborn, 4 J. J. Mar., (Ky.,) 395.

The records, despite Sanford's claim, establish the fact that Sanford entered into possession by virtue of a contract. He could not have entered by virtue of his deed from Finnegan, because at the time of the execution of the deed, and for at least nineteen years previous, the land had been held adversely to Finnegan. (Magruder, et al., vs. Perpall, 13 Fla., 602.) If he did not enter into possession by virtue of his contract, then his entry was unlawful and he cannot obtain the aid of a court of equity in retaining that which he took possession of unlawfully.

Sanford was estopped from questioning Cloud's title because he claims title under Finnegan and Potter, and Finnegan's deed to Sanford recognized Potter's title in the land. Sanford is therefore estopped from denying title in Potter and those holding under him, which is recognized in the very deed under which he claims. Hart vs. Johnson, 6 Ohio, 87.

The rule has been repeatedly affirmed that one claiming title under a party who is estopped to deny the title of another, is bound by the estopped to deny the title of another is bound by that estoppel. Phelps vs. Blunt, 2 Dev., N. C. L., 177; Washburn on Real Property, Vol. 3,

94; Scott vs. Douglass, 7 Ohio, 227; Casen vs. Jackson, 4 Pet. 85; Douglass vs. Scott, 5 Ohio, 194, &c.

"Fraud is never presumed but must always be proved." (Wilson and Clelan vs. Scott, 5 Fla., 305; White vs. Walker, 4 Fla., 478, Smith and wife vs. Hines, 10 Fla., 258.) Not even a presumption of fraud can be derived from any part of the records of the case. Nor was there any misrepresentation, or if there was any misrepresentation it was simply that of opinion as to the validity of the title, based upon facts frankly stated to Sanford. Story Equity Jurisprudence, 191, and other authorities quoted.

The misrepresentation, if there was any, must have actually misled Sanford. Walker vs. Hughes, 59 Ill., 375; Gentry vs. Shutter, 44 Md., 237.

Sanford could not have been misled by Cloud's misrepresentation. Cloud had told him truthfully from whom he had derived his title. His opinion as to the titles being good should not have misled Sanford. His duty was to have instituted inquiries, all sources of information being open to him. (Story Equity Jurisprudence, sec. 200.) When each party has equal means of ascertaining the facts, equity will not relieve. Perry on Trusts, 200.

There was not any misrepresentation whatever at the time of the executing the contract, and at the time of beginning of suit Cloud had not only the possession but the right of possession, and the right of property in the land was vested in him. (Washburn, vols. 3 and 4; Walker Am. Law.) That a deed has been executed by Finnegan to Potter, in 1856, the records and Finnegan's testimony clearly establish. In all of Finnegan's other deeds the fact of a sale and conveyance to Potter is ecited. Finnegan was estopped from denying the execution of the deed. He never has denied the execution. He held title by conveyance from Potter, who held from Finnegan, (Douglass vs. Scott,

) and Finnegan admits the conveyance in all his deeds grant.

even if there had never been any written deed from ;an to Potter, Cloud's title was still perfect. The re- learly shows that Potter held adversely to Finnegan, ith Finnegan's knowledge and consent, at least from and that such adverse possession even after, in 1861, Potter executed deed to Cloud, the land had been dversely to Finnegan a period of nine years. By the f 1847, Potter had consequently acquired a title by ɔtion. In 1876, when the suit was brought, there :en twenty-four years adverse possession, thus vesting ıd an absolute indefensable title. Magruder, et al., rpall, 13 Fla., 602; Washburn on Real Property, vol. to 138; School District vs. Benson, 31 Me., 384,385; cited in Wash., vol. 3,146; Hughes vs. Groover, 39 nt, 365.

'as competent for Cloud to prove the identity of the ɔy parol testimony. When a deed is uncertain or in its description of land, parol testimony is compe- ɔ establish it. Harvey vs. Mitchell, 11 Foster, (31 .) 575; Bonner vs. Willy, 39 Ill., 418; Bell vs. Wood- 46 N. H., 332; Greenleaf on Evidence.

JUSTICE WESTCJTT delivered the opinion of the

ntiff, Sanford, in possession of the land which is the ın of the controversy, asserts a fee simple title in him- ereto, alleges that the defendant, Cloud, holds a con- ıf sale of said land executed by the defendant as ven- ıd himself as vendee;* that this contract originated fraud and covin of defendant; that it is a cloud upon le, and that defendant has instituted suits at law upon

* contract on pp. 535 to 538 of this volume.—REPORTER.]

such contract against him, the plaintiff. He prays for a decree that the contract may be cancelled as "null and void;" that defendant may be enjoined from asserting title thereunder; that plaintiff may be protected in his possession, and that defendant may be decreed to repay to plaintiff such sums as were paid him by plaintiff under the contract, as well as for damages.

This bill presents the case of a party in possession of land seeking the aid of a court of equity to remove a cloud upon his title.

In such cases a party is relieved upon the principle *quia timet,* that is, for fear that such contract may throw a cloud or suspicion over his interest or title. The interference of a court of equity in such cases is a matter of discretion—that is, a sound and reasonable discretion, *secundum arbitrium boni judicis.* 1 Story Eq., 693.

The jurisdiction exercised in such cases is to give a party in possession denied the privilege of trying at law the right of possession, repose, and peace. It is to relieve him against vexation resulting from a deed or contract of any character obtained under such circumstances as would induce a court of equity to put into active operation its power of "protective and preventive justice," through the instrumentality of a decree directing the surrender and cancellation of the deed, and by affording such other and additional relief as should follow from this equity.

There is one rule of universal application which prevails in cases of this character. It is nowhere better stated than in the case of Banks vs. Evans, 10 S. & M., 62, where it is said that "he who comes into equity to get rid of a legal title, must show clearly the validity of his own title and the invalidity of his opponent's." Equity will not act in such cases in the event of a doubtful title. 1 Story's Eq. Jur., 11th Ed., sec. 700 note a; 54 Ill., 523; 44 Miss., 654; 2 Nev., 209; 10 S. & M., 62. So, also, is it a rule, both in

courts of law and equity, that a party to be relieved and to succeed in contests of this character must do so on the strength of his own title, and not on the weakness of that of his adversary. 7 Wheat., 242. Being controlled by this primary rule in cases of this character, our conclusion is that the plaintiff here must fail for the reason that at the hearing he did not show title in himself. Plaintiff claims title through Finnegan. Defendant claims title both through and against Finnegan, claiming, first, through a deed from Finnegan to his grantor (such deed being alleged to be lost) and second through an adverse possession by himself and his grantor of sufficient length of time to bar the entry of Finnegan and those claiming through him under the statute of limitations.

Anterior to 1850 the legal title to this land was in Joseph Finnegan, he having purchased a Spanish grant embacing this land of Moses E. Levy, Levy's title being admitted by the United States. Constant Potter, the grantor of defendant Cloud, having settled upon and entered the land under the armed occupation act of August 4, 1842, received a patent for the land from the United States on the 26th June, 1850. It was discovered that the United States had not title at the date of this patent and the patent was subsequently cancelled and a float issued to Potter in lieu thereof. Finnegan, plaintiff's grantor here, who had as stated, acquired the land in 1848 or 1849 from Levy, found Potter in possession in 1850 or 1851 claiming under his patent. Finnegan "did not propose to remove him, but agreed that if Potter would give him his claim against the government he, Potter, might remain." This Potter did, and Finnegan swears that while he does not recollect positively, still he was always of the impression that he made Potter a deed for the land, that he always treated the land as Potter's, that he never claimed any ownership or exercised or attempted to exercise any control over it, and

it Potter held adversely to him. Potter was therefore adverse possession as against Levy or Finnegan, under aim of title from the United States in 1850, and his pos- ession after that time was adverse to Finnegan and his is grantees. On the 15th day of May, A. D., 1860, the land d was conveyed by Potter to Cloud, the defendant in this is suit. Cloud went into possession under deed from Potter, and so remained in possession up to the time of plaintiff's entry into possession in the spring of 1871.

Sanford the plaintiff claims title under a warrantee dee ed from Finegan dated the 11th day of May, A. D., 187 0, and a quit claim deed from Finnegan dated the 27th d ay of April, A. D., 1871. These deeds cover the Spani sh grant, of which this land was originally a part. In t he warrantee deed Finnegan excepted from the grant "th se tracts or parcels of land heretofore conveyed out of s id grant by the said Joseph Finnegan to the parties here in- after named to-wit: a tract of one hundred and sixty ac res to the heirs and representatives of Henry A. Crane, kon wn as the Mellonville tract, and one hundred and sixty ac res to the heirs and representatives of Constant Potter." The quit claim deed covers the whole of the Levy grant with an exception of those tracts or parcels of land heretofore conveyed out of said grant by the said Joseph Finnegan. The quit claim deed was without consideration. Some questions were raised in argument as to the effect of these exceptions, and there is testimony in the record going to establish knowledge by Sanford as to what was intende by them, but we examine the question of title witho reference to the matter.

It is clear from the above statement of the title of respective parties, that Constant Potter held admitte verse possession of this land under claim of title from or 1852 up to the date of his deed to Aaron Clou 15, 1860, and that Cloud held adverse possession

claim of title derived from Potter from that date up to the 13th December, A. D., 1861, the date at which the statute of limitations was suspended in this State. This is a period of more than seven years. The statute of limitations in force in this State at that time was the act of 1848, chapter 142, laws. This act limited the right of entry of Finnegan, plaintiff's grantor, to within seven years next after his right or title accrued as against all and every adverse possession of the land for the term of seven years.

We have in this case seven years possession by Cloud and those under whom he holds adverse to Sanford and those under whom he claims, and as no legal disability such as operates to suspend the statute is shown or claimed to exist on the part of Sanford's grantors, it is clear that Sanford had no title as against Potter and his grantors. The only doubt as to Cloud's title from Potter which the record discloses is an allusion in plaintiff's testimony to the question of an outstanding right of dower in the wife or widow of Potter. There is no allusion to this matter in the bill, or any of the pleadings. Among the proofs before the Chancellor at the hearing, was a conveyance by a person purporting to have been the wife of Potter at his death, reciting her subsequent marriage and divorce. This conveyance appears to be sufficient. It is executed in proper form and conveys to Cloud any interest which she had in the property.

It is thus clear that upon the hearing it not only appeared that plaintiff had no title, but it was apparent to the court that the possessory title was in Cloud, and that the right of entry of Sanford and his grantors was barred.

Plaintiff having no title upon which this contract of sale could be a cloud, it follows that the bill should have been dismissed at the hearing.

Before leaving this question it is proper that we should say more of the nature of Potter's title as against Finne-

gan, as well as something concerning the alleged fraud of Cloud in the contract of sale, and the nature of Sanford's possession.

We have remarked that Potter's possession was adverse and under a claim of title. That it was adverse in its nature is clearly established by the testimony. He first claimed under a patent from the United States. That the title was not at that time in the United States, did not change the nature of his possession. (4 Sand., Chy., 633.) The title not being in the government or sovereign, an adverse possession under a claim of title could be effective, and a claim under a patent erroneously issued is a claim of title. It is not necessary that there should be a rightful title. That Finnegan executed a deed to Potter is not clearly established. Finnegan is under the impression that he did; but we deem this immaterial. Potter claimed to own the land. It was not necessary that he should have claimed under a written contract, and looking to the testimony of Finnegan, there was unquestionably a written or parol contract by Potter with Finnegan. Potter claimed the fee and had adverse possession. Finnegan in all his transactions with Sanford admitted and advised Sanford that he claimed no title to the land as against Potter. Here was an entry and continued adverse possession under a claim of title. It was not necessary that he should have claimed title under a paper writing, or if he did so claim, that it should be a good conveyance. 8 Cowen, 589; 3 Watts, 72.

As to the alleged fraud upon the part of Cloud in the matter of this contract of sale with Sanford. We do not see evidence of anything more than error or mistake upon the part of Cloud. We cannot infer fraud from evidence entirely consistent with simple mistake. In addition to this, however, the bill here is not for a simple rescision upon

an equitable basis of restoration to rights and relations existing anterior to the contract of sale.

As to Sanford's possession. The nature of this possession is a matter which may be properly considered under the bill and answer in this case.

Anterior to the quit claim deed of Finnegan, under which Sanford claims possession, he, Sanford, treated with Cloud as the owner of the land, and by virtue of Cloud's covenants and a receipt by Cloud of two hundred dollars, he was given the right of possession as against Cloud. He took possession. As between himself and Cloud his possession must be referred to this contract without reference to his intentions and wishes not made known to Cloud at the time of his entry. Cloud did not give him possession under any adverse claim of title, and whatever may have been his private ulterior purpose, his entry, so far as Cloud is concerned, must be referred to the contract under which Cloud agreed that Sanford might take possession, and Sanford agreed to take possession. If he wished to contest Cloud's title and rights, he should have done so not by an apparent and agreed admission of them, or by an acting in subordination to them. He obtained his possession, so far as Cloud was concerned, by an admission of Cloud's right, and he is estopped to deny that right.

These parties are privies in estate. The rule we mention is a general one. It should not be defeated by subtle and refined distinctions of the vendee as to his intended method of entry into possession. If he gets the covenants of a party yielding possession, and enters into covenants looking to his taking possession, a court of equity will refer his entry, so far as this party is concerned, to such covenants. It was while thus entitled to possession, or after possession of the the land was taken, that Sanford, without consideration, received from Finnegan the quit claim deed to the tract of land of which this land was originally a part.

Independent of other facts connected with this transaction, as established by the testimony, Sanford thus in possession purchasing an outstanding title, (if such it had been,) is entitled to nothing more than its fair and *bona fide* cost. In this case it cost Sanford nothing. 1 Sug. on Vend., 642; 4 Mon., 297; 2 John., 33; 3 S. & M., 694; 10 S. & M., 501; 1 Barb., 115; 34 Penn. State, 146.

This rule results from "the relation which it has been found expedient to establish between vendor and vendee to preserve the confidence which, in matters of contracts, ought to exist between man and man, and to prevent undue advantage from information acquired by means of such contracts." Says Chancellor Kent, speaking of this subject, "it is a general principle pervading the cases, that if a party who has a limited interest gets an advantage by being in possession 'or behind the back' of the party interested in the subject, or by some contrivance in fraud, he should not retain the same for his own benefit, but shall hold it in trust." 2 John. Chy., 33.

In view of the title of the plaintiff as thus disclosed, as well as in view of the nature of his possession, it is apparent that the plaintiff had failed to make out his case, and the bill should have been dismissed.

Instead of dismissing the bill, the Chancellor directed, substantially, a performance of the contract, which plaintiff sought to set aside. There was no cross bill by the defendant under which he could obtain relief based upon equities which the proofs may have established. The case is not one for an account, or one of such character as to constitute it an exception to the rule, that the defendant, to have affirmative relief, must resort to his cross bill. Upon a bill by a vendee in possession of land under an agreement to purchase seeking to set aside the contract of sale as a cloud upon his title, the defendant vendor cannot, without cross bill, have a decree for specific performance of the

ıct. Litt. Sel. Cases, 145; Wooten vs. Bellinger, 17 Fla., 9; 3 Danl. Chy. Pldg, and Prac., 1680; 11 Wheat, 446; Mad. Chy., 329; 2 Atk., 133; 1 Ball & Beat., 217; 13 ɜs., 546; 15 Ib., 525. The conclusion of the court is, ɛrefore, that the decree herein rendered should be reversed d the cause remanded, with directions to dismiss the l.

Appellant's counsel think that we should determine and ɪtle the rights of the parties. We have nothing calling ɔo action the jurisdiction of the court in this case except ɜ bill. The plaintiff here seeks a cancellation of this reement. This is the prayer of the bill. No case is made the bill looking to the validity of this contract of sale. ıe whole structure of the case is based upon an utter re-diation of it. To treat of this agreement as effective and lid, would be inconsistent with the relief prayed as well with the case made by the bill. The only proper decree ıs to dismiss the bill. Litt. Sel. Cases, 146; Story Eq. dg., 41; 6 Harr. & John., 29; 10 Pet., 182; 2 Pet., 595; Daniel Chy. Pldg. and Prac., 383.

The decree is reversed, and the case will be remanded with rections to dismiss the bill.

M. B. LINDSAY, ET ALS., APPELLANTS, VS. JOHN O. MATTHEWS, APPELLEE.

One Robinson held the legal title to land as security for the payment of money borrowed by Matthews. Matthews borrowed of one Church money to pay Robinson, and Church took a note from Matthews and a deed from Robinson of the land as security for the money loaned to Matthews, and at the same time Church gave Matthews an agreement to convey to him, on payment of the money

by a day certain, the agreement reciting that Church held the title as security for the payment of the money mentioned in the note. Afterwards Church assigned the note and conveyed the land to appellants by deed, reciting at length the agreement to convey to Matthews on such payment, and that appellants should perform the agreement; *Held,* that appellants held the land as a security for payment of the money, and that their claim upon the land was that of mortgagees holding the title in trust for Matthews until payment by him or until foreclosure.

2. Upon payment or tender of the money due by the terms of the note and agreement after due, the court will entertain a bill by mortgagor to redeem the lands and compel a conveyance to him according to the terms of the agreement.

3. The fact that Matthews never had the title to the land does not affect his rights as the owner of an equitable interest; a conveyance, at Matthews' request, by the trustee holding the legal title for him, gives him the same standing in equity as though the conveyance or mortgage was made by him.

4. In such case the court will enjoin a suit at law commenced by the holders of such legal title against the equitable owner to recover possession before foreclosure.

5. A tender of money due will not operate to stop the accruing of interest unless such tender is absolute and unconditional; if the tender is accompanied by a demand of deed or release as a condition of the tender, interest will continue to accrue.

6. Upon bill by a mortgagor to redeem, there being no prayer for a sale of the lands, and no cross bill, it is irregular to decree a sale.

Appeal from the Circuit Court for Marion count.

This is an appeal from the decree of the Circuit Court for Marion county.

The bill and answer show the facts following:

In 1873 Mathews bargained with one Cole, of North Carolina, for the purchase of about 170 acres of land in Marion county, Florida, taking from Cole an agreement to convey on payment of purchase money. He then borrowed from C. L. Robinson the money to pay for the land, and paid for it, taking a deed running to Robinson for Robinson's security. Subsequently, in 1874, Matthews contracted

to sell to one Vinson an undivided half of the tract of land, and in pursuance of this contract Robinson conveyed to Vinson. In September, 1875, Vinson conveyed this undivided half to the defendants.

In February, 1875, Matthews borrowed of John Church $2,100 for the purcose of paying Robinson what was due him, and on such payment, Robinson, at the request of Matthews, conveyed the remaining undivided half by deed to Church, and at the same time Church executed and delivered to Matthews an instrument as follows:

"Know all men by these presents: That I, John Church, of the city of Boston, State of Massachusetts, in consideration of one dollar paid to my full satisfaction, the receipt whereof is hereby acknowledged, have covenanted and agreed, and by these presents do covenant and agree with John O. Matthews, upon the payment to me on or before the 1st day of March, A. D. eighteen hundred and seventy-seven, (1877,) of the sum of twenty-one hundred dollars, with interest from the date hereof, at the rate of eight per cent. per annum, I, the said John Church, will execute to the said John O. Matthews, a good and sufficient quit claim deed of the undivided half of lots * * *, containing one hundred and fifty acres of land, more or less, according to United States survey, which said tract of land was this day deeded to me by Elizabeth S. Robinson and C. L. Robinson, of the county of Duval, State of Florida—The said deed having been executed, and this defeasance given for the purpose of mortgaging the said land to me for the security of payment of twenty-one hundred dollars, which I have this day loaned to the said John O. Matthews, and for which I hold his note for twenty-one hundred dollars, made this day, to run at eight per cent. per annum till the first day of March, A.

D. 1877. Witness my hand and seal this 19th day of February, A. D. 1875.

JOHN CHURCH." [L. S.]

On the same day Church gave to Matthews an instrument [illegible]nt for $2,100 and interest at eight per cent., payable March 1, [illegible] 1, 1877.

On the same day Church gave to Matthews and instrument [illegible]ent under seal, releasing and discharging all prior claims and [illegible]nd demands against Matthews, "except the mortgage upon the [illegible]he one-half of the said John O. Matthews in an orange grov[illegible]ove on Orange Lake, Marion county, Florida, which mortgag[illegible]age is dated the 19th day of February, 1875, and made by C[illegible] C. L. Robinson and wife to John Church." November 24[illegible]24, 1876, John Church in consideration of $2,394, conveyed t[illegible] to the defendants the said undivided one-half of the premis[illegible]ses by an instrument having all the form of a full covenan[illegible]ant deed as to title, estate, and against incumbrances, but wit[illegible]ith the following condition incorporated in the body of th[illegible]the deed: "except a certain bond or contract for title, which I, the said party of the first part, on the 19th day of Februar[illegible]ry, 1875, made, executed, and delivered to John O. Matthe[illegible]ws, of Marion county, and State of Florida, which reads as f[illegible]ollows: [then follows a copy, verbation, of the contract ab[illegible]ove quoted.] And I, the said party of the first part, do by these presents hereby transfer and assign unto the said pa[illegible]rty of the second part, [defendants,] the said note and all [illegible]my claims and evidence of indebtedness against the said Jo[illegible]hn O. Matthews, as explained or set forth in the foregoi[illegible]ng bond or contract for titles for the payment of the s[illegible]aid twenty-one hundred dollars with the interest thereon, a[illegible]nd it is expressly understood that this deed of conveyance is made and executed subject to the above-mentioned bond or contract for titles, which the parties of the second part hereby agree to carry into effect the same as I could or may

have done as a part of the condition for the conveyance of the above-described premises."

Matthews, at the time of this purchase by defendants, was in possession and had made valuable improvements upon the property.

The defendants in 1875 offered Matthews $7,500 for one-half of his interest in the property, but defendants say that they, at this time, supposed Matthews had title, and on discovering the position of Church treated with him and purchased his interests subject to Matthews' rights. Matthews and the defendant, Lindsay, acting as the agent of all the defendants, also in 1875, entered into an agreement in writing for a partition and the establishment of boundary lines between their respective portions, the defendants expecting, as they say in their answer, that Matthews would pay the $2,100 and interest when due under the contract made with Church.

On the 7th of April, 1877, Matthews offered Albert S. Kells, one of the defendants, to pay the amount due, but did not tender the money. In May, 1877, defendants demanded possession from Matthews, which Matthews refused to yield. Afterwards, in the same month, complainant tendered to said Kells, one of the defendants, and as agent for the other defendants who were absent from the State, the sum of twenty-four hundred and seventy-eight dollars, being the amount due on the note and contract to redeem the land from the said "mortgage security," and demanded a deed of conveyance according to the terms of the agreement. Kells refused to receive the money tendered, on the ground that he "had no authority from the other defendants to receive money from complainants in the behalf it was tendered."

Complainant avers that Church had no interest in the land save that he held the legal title as a security for the money loaned to Matthews; that in equity he was a mort-

gagee only; that defendants, by the terms of the transfer from Church, were invested with such rights only as belonged to Church; that defendants claim to be the purchasers and owners in fee of the lands, because the money due from Matthews was not tendered when it became due; that Matthews had no interest except as a purchaser under the agreement to convey upon strict compliance by him, and that his failure to comply at the day fixed put an end to his interest in the land, and this claim is set up by defendants in their answer.

The defendants commenced proceedings at law to eject Matthews.

The defendants commenced proceedings at law to eject that he is ready to pay the money into court, and defendants should be required to accept the amount tendered, without interest after the tender was made, and to convey the property to him according to the terms of the agreement, and for such other and further relief as he may be entitled to.

Testimony was taken under the order of the court, and the cause heard upon bill, answer and the evidence filed.

The court decreed that the interest of defendants upon the undivided one-half of the premises in question was precisely that which Church had and conveyed to them; that the conveyance by Robinson to Church was made to secure the payment to Church of the sum of twenty-one hundred dollars mentioned in the promissory note, and in the agreement of Church to convey to Matthews, upon payment thereof with interest, which said note had been assigned by Church to defendants; that Matthews had tendered to defendants on the 24th May, 1877, the amount due upon said note and agreement, which tender was refused by them, to wit: the sum of $2,480.33.

It was further decreed that the defendants execute and deliver to the complainant, Matthews, a good and sufficient

quit claim deed of conveyance of the premises described in an agreement for partition entered into for the partition of said lands by and between the parties, upon payment by Matthews of said $2,488.33, with interest on $2,100 from the date of the decree at eight per cent. per annum; and that unless the said monies be paid within sixty days from the date of decree the defendants may have the interest of Matthews in said lands sold by the Sheriff, upon due notice, for the payment of said money. Upon Matthews tendering the money to defendants, or upon his paying the same into the registry of the court subject to the demand or order of defendants, they and each of them are enjoined from ever, in any manner, setting up any claims or demands in, to, or over said lands by reason of any of the matters complained of in the bill. It was further decreed that, upon such payment or tender by complainant, then all interlocutory orders, decrees, and proceedings in this suit shall be dismissed and vacated.

Further decreed that defendants pay the costs of this suit. Signed and entered June 8, 1878.

The defendants appealed from this decree upon the following grounds:

That the conveyance from Church to defendants gave them an absolute title to the estate, subject only to Matthews' right to purchase under the agreement signed by Church, and that under that agreement Matthews was simply a purchaser, and having failed to pay the purchase money on the day it was payable, he had no right to pay and demand a conveyance afterward;

That the relation of mortgagor and mortgage did not exist between the parties;

That the alleged tender, made after the money became payable, was not a lawful tender, and did not stop the accruing of interest, if the relation of mortgagor and mortgagee did exist;

gagee only; that defendants, by the terms of the transfer from Church, were invested with such rights only as belonged to Church; that defendants claim to be the purchasers and owners in fee of the lands, because the money due from Matthews was not tendered when it became due; that Matthews had no interest except as a purchaser under the agreement to convey upon strict compliance by him; and that his failure to comply at the day fixed put an end to his interest in the land, and this claim is set up by defendants in their answer.

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It was further decreed that the defendants execute and deliver to the complainant, Matthews, a good and sufficie

hundred dollars, made this day, to run at eight per cent. per annum till the first day of March, A. D. 1877."

This agreement incorporated in the conveyance by Church to the defendants, is full notice to them at the time of their "purchase" that Church was Matthews' creditor, that he held a promissory note for the indebtedness, and that the deed from Robinson to him was executed and to be held as a mortgage upon the lands to secure the money mentioned in the note. They had notice further, that Matthews was in possession and had been there for years improving the premises and enhancing its value, this being alleged in the bill and expressly admitted in the answer. It is further admitted in the answer that the defendants a short time after the date of the agreement between Church and Matthews, offered Matthews $7,500 for one half of his interest in the property, and that they on discovering the relations of Church and Matthews to the property, sought Church and purchased his right and title to the *whole* of Matthew's interest for the consideration of $2,394, (as testified to and as expressed in the conveyance by Church,) expecting, as they say in their answer, that if Matthews should not promptly pay the money, by the day appointed, his rights would cease and they would obtain Matthews' entire interest for less than $2,400; for one half of which they had offered to pay $7,500. This has a striking resemblance to the ancient transaction regarding the "pound of flesh" of which we have somewhere read.

Mr. Church was examined as a witness on the part of the defendants and testified that his object in giving the paper to Mr. Matthews was to relieve him, as he was paying Robinson eighteen per cent. interest for money. He said further that he supposed the property would be long to him in case Matthews failed to pay the note on the day specified in the contract. On cross examination he says that at the time of the execution of the papers he

loaned to Matthews $2,100. That he let Matthews have the money for the purpose of getting the titles out of Mr. Robinson's hands for which he said he was paying a "fancy interest." Understood that Matthews had a "bond for titles" from Robinson similar to this one I gave Matthews, and that Robinson held the title as security for a debt due from Matthews to Robinson. There was no other mortgage or deed made by Robinson to witness except the deed of conveyance. Took a note from Matthews for the $2,100 money loaned him because it was the custom and he, Matthews, tendered it to witness.

Witness further testified that he expected that, if Matthews failed to pay the money at maturity of the agreement and note, the property would become his and that it would be optional with him to carry out the agreement or not, afterward. He gives the facts and the court will construe and give them such effect as is consonant with the true intent of the parties. The written contract speaks of a loan negotiated by Matthews of Church for a given purpose, that the money was loaned and a note given therefor, that Robinson, at Matthews instance (not Church's *purchase* of the property) conveyed the land and Church executed the defeasance "for the purpose of mortgaging the land to me (Church) for the security of the payment of $2,100, which I have this day loaned to the said Matthews."

Nothing can be clearer than this as to the intention of all parties, and Church and Matthews agree in regard to the facts leading to this agreement. Church testifies that Matthews introduced him to Robinson "for the purpose of making negotiation and loaning the money, to put me in the same place that Robinson stood in respect to the land." Church nowhere in the transaction figures as a purchaser of the lands, but does figure solely as a lender of the money to Matthews, and the holder of a security for its repayment. He testifies that he understood at the time of his

negotiation that Robinson held the legal title as security for money owed him by Matthews, and Matthews procured the transfer of that title to Church in order that he might be secure for the money loaned by him to Matthews.

As before remarked, the deed executed by Robinson, (who, in view of the facts was the holder of the legal title, upon a certain trust, for Matthews,) and the defeasance, were parts of one entire transaction, and had the same relation to each other and to the position of the parties thereto, as though they had been incorporated in one instrument.

In Pierce vs. Robinson, 13 Cal., 116, Field, J., said: "Parol evidence is admissible in equity to show that a deed absolute upon its face was intended as a mortgage, and the restriction of the evidence to cases of fraud, accident, or mistake, in the creation of the instrument, is unsound in principle and unsupported by authority. * * * As the equity upon which the courts act arises from the real character of the transaction, it is of no consequence in what manner this character is established, whether by deed or other writing, or parol. Whether the instrument, it not being apparent on its face, is to be regarded as a mortgage, depends upon the circumstances under which it was made, and the relations subsisting between the parties. Evidence of these circumstances and relations is admitted, not for the purpose of contradicting or varying the deed, but to establish an equity superior to its terms."

This is the rule now quite universally held by the courts of equity. A very large number of cases are cited in Hare and Wallace's notes to Thornbrough vs. Baker, in Leading Cases in Equity, (4 Am. Ed.) page 1983, et seq., which sustain it. But this case does not rest upon parol evidence, to show the character of the conveyance. "Where the instruments are of even date on their face, and where, being in terms a conveyance and a contract to reconvey on

payment of the money passing between them, they are, in legal contemplation, a mortgage." Harper's Appeal, 14 P. F. Smith, Pa., 315.

Appellants claim that because the deed was by Robinson and not by Matthews, and because Matthews never held the legal title, he is not entitled to redeem as a mortgagor. This is answered, first by the terms of the agrement which expressly names him as the party in interest to whom the deed is to be made upon payment by him, and second by the ruling of the courts, establishing the legal and equitable *status* of the parties. In Stoddard vs. Whiting, 46 N. Y., 627, Grover, J., for the court, says: "When the owner of the equitable title directs his trustee of the legal title to convey such title to a third person as security for a debt of the former to the latter, or as security for any other person, it is obvious that the latter holds such title as mortgagee of the former. That he did direct such conveyance for such a purpose may be shown by parol. This is equally as clear as that an absolute deed may be shown to have been intended as a security, and therefore a mortgage. Whether the legal title is held by the party wishing to mortgage the land, and the deed, therefore, given by him, or such title held by a third person, as his trustee, who conveys the same at his request, does not affect the rule in this respect."

The same court in Carr vs. Carr, 52 N. Y., 251, holds that "in order to establish that a conveyance, absolute on its face, was intended as a mortgage, and to give it effect as such, it is not material that the conveyance should be made by the debtor, or by him in whom the equity of redemption is claimed to exist." In that case Daniel D. Carr had ngotiated for the purchase of the premises from one Berry and had paid some of the purchase money, and entered upon and improved them for his own benefit; a part of the purchase money was advanced by the plaintiff for

and at the request of Daniel D., who thereby became a debtor to the plaintiff for the amount thus advanced, and by the arrangement Perry conveyed the premises to plaintiff, thus vesting the legal title in him in consummation of the equitable title which Daniel D. had under his agreement, plaintiff to hold the legal title as security for the repayment. "By the transaction," the court says, "a trust was created in the nature of a mortgage for the security of the plaintiff, with right of redemption in Daniel D. Carr. * * The fact once established either by the terms of the conveyance or by other evidence, that the grant was intended as a mortgage, the rights of the parties are measured by the rules of law applicable to mortgagors and mortgagees, and the conveyance remains but a mortgage until the equity of redemption is foreclosed, and the mortgagee cannot have ejectment against the mortgagor, or those claiming under him, until after foreclosure." The court further reiterates and approves the ruling in Stoddard vs. Whiting, and says in conclusion, "the plaintiff cannot maintain ejectment, but he can foreclose his mortgage by action if there is anything remaining due for his advances." They also repeat what had been said by them in a former case that "the attempt to hold the property as upon an absolute grant, divested of all equity of redemption, was too gross a fraud to be permitted." Where land was conveyed by a deed absolute on its face to secure a debt due from another person, and an agreement was entered into by the creditor to convey to the debtor upon payment of the debt; *held,* that these two instruments constituted a mortgage. Weed vs. Stevenson, 1 Clarke, (N. Y. Chan.) 165; Brown vs. Dean, 3 Wend., 208.

But cumulative of the common rule of equity, our statute is very plain, and the complainant might rest entirely upon it as to the character of the conveyance to Church. An act to amend the laws in force relating to mortgages,

approved January 8, 1853, provides that "all deeds, obligations, conditioned or defeasible, bills of sale, or other instruments of writing, made for the purpose, or with the intention of securing the payment of money, whether such instruments of writing be from the debtor to the creditor, or from the debtor to some third person or persons in trust for the creditor, shall be deemed and held as mortgages, and shall be subject to the same rules of foreclosure, to the same regulations, restrictions, restraints and forms, as now are, or hereafter may be prescribed by law in relation to mortgages; but in no case shall the obsolete and antiquated claim in favor of the mortgagee to the right of possession, * * by reason of any alleged failure of payment, or breach of promise, or other default, be recognized or admitted, * * * until all other steps and forms prescribed by law for the foreclosure of mortgages be complied with and observed," and in the same act it is provided that "the mortgagee is incapable of acquiring possession until after decree of foreclosure, and then only by bidding and outbidding all competitors."

It is claimed, however, by appellants, that this statute does not apply because, they say, it is limited in its operation by the words "whether such instruments of writing be from the debtor to the creditor, or from the debtor to some third person," and that in this case the conveyance is not by the debtor at all. The words last quoted are descriptive of certain instruments embraced within the provisions of the act, but they do not affect the application of the provisions of the act to all instruments of the character mentioned in it, to-wit: writings conveying property for the purpose of securing the payment of money. But in the narrowest construction that may be given, the instruments mentioned in the pleadings, (the deed and the defeasance,) must be taken to be embraced within the terms of the act, and the remedies therein prescribed must

be pursued. The Supreme Court, in McGriff, administrator, vs. Porter, 5 Fla., construes the act "as designed from its whole scope to limit, restrict and control the operation of certain classes of conveyances described therein, and not to enlarge or extend the operatijve force and effect of others." That case is referred to as bearing against the complainant in this case, but it is not clear in what respect it is so. Nor is anything determined by the court in Chaires vs. Brady, 10 Fla., 133, opposed to our conclusions here.

It is very clear that Matthews' position gave him standing in a court of equity to maintain his bill to enjoin proceedings at law designed to harass and evict him from the premises, and a right to redeem and demand a conveyance to himself by such deed as is contemplated in the written agreement of Church. See White and Tudor's notes and Hare and Wallace's notes to Thornbrough vs. Baker, Lead. Cas. in Eq., 4 Am. Ed.; Campbell vs. Dearborn, 109 Mass., 130.

The court below was clearly right in decreeing that Church was a mortgagee; that the transfer by him to those defendants invested them with the same rights as belonged to Church and none other, and that Matthews, as the owner of the equity of redemption, was entitled to redeem by paying the amount due upon the note and the agreement, to-wit: $2,100 and interest, and that the defendants must execute the agreement as to a conveyance of the property to Matthews, by such form of deed as was contemplated by it.

This disposes of the most important branch of the case.

We next consider the question of the tender made by complainant. There were two separate efforts to effect a tender, and to obtain a deed by complainant under the agreement. The first was abortive, because it was a mere offer to pay, not a tender of money. The next was an actual tender of the amount due at the time. The bill alleges that the complainant tendered the money and demanded a deed

of conveyance of the one-half of said premises. The tender was refused, and the defendants declined to convey on the ground that the tender was too late, the money being past due.

Matthews testifies that he went to A. S. Kells, one of the defendants, and told him he wanted to pay the note, "and required him to make me a deed to my half of the property, and that upon the execution of the deed I would pay him the money."

At the same time Mr. Harris, in behalf of complainant, handed Mr. Kells a paper signed by H. W. Long, Clerk of court, to the effect that a sum of money had been placed in his hands to pay the lien on the property held by defendants on their executing and delivering to Matthews a good and sufficient deed. "Mr. Kells took it and read it, and said he could do nothing about it." He further testified that he instructed J. F. Dunn to tender Mr. Kells, for himself and other defendants, the money and demand a deed from them. Kells was the agent of defendants, and he was the only defendant then in Florida.

John F. Dunn testified that "on the 24th of May, 1877, in Ocala, I, as the attorney of Matthews, and at his request, made a tender of twenty-four hundred and eighty dollars and thirty-three cents to Albert S. Kells, one of the defendants, and as agent for the other defendants. The tender was made in U. S. currency, which I then held in my hand for the purpose of paying to the defendants a note given by complainant to John Church or order, Feb. 19, 1875, which note Mr. Kells informed me the defendants held at the time, and demanded of said A. S. Kells said note, and full complainance of a contract made by the said John Church conditioned upon the payment of said note; contract bearing even date with the note obligating to convey the complainant certain hands therein mentioned upon the ment of said note, to which he replied; 'the time had

for the payment of the note, and they would not therefore receive the money.' I received the money from Mr. Agnew upon an order from Matthews, and returned the money to Mr. Agnew the same day."

There was some other testimony in regard to the tender and demand by the complainant and the refusal by defendants, but the foregoing is all that is deemed material.

It is not seriously questioned that the defndant, A. S. Kells, as one of the assignees or grantees of Church, and one of the owners of the note of Matthews, and the only one accessible within the State, was a proper person to whom the payment or tender of the money due might be made.

Mr. Justice Christiancy in Potts vs. Plaisted, 30 Mich., 149, thus lays down the rule as to the mode in which a tender should be made: "In view of the serious consequences to the holder of a mortgage upon the refusal of a tender—consequences which may often amount to the absolute loss of the entire debt—and in view of the strong temptation which must exist to contrive merely colorable or sham tenders, not intended in good faith, we think the evidence should be so full, clear, and satisfactory as to leave no reasonable doubt that the tender was so made that the holder must have understood it at the time to be a present, absolute, and unconditional tender, intended to be in full payment and extinguishment of the mortgage, and not dependent upon his first executing a receipt or discharge, or any other contingency." See, also, Cothran vs. Scanlan, 34 Ga., 555; Pulsifer vs. Shephard, 36 Ill., 513; Shaw vs. Sears, 3 Kansas, 242; Hunter vs. Warner, 1 Wis., 141; 1 Duval, (Ky.,) 304; 15 Wend., 637.

If there is any express or implied demand for a receipt, as a condition of payment, it will not be a sufficient tender. Sanford vs. Bulkley, 30 Conn., 344; Perkins vs. Beck, 4 Cr. C. C., 68; Richardson vs. Boston, &c., Co., 9 Metc., 42;

Wood vs. Hitchcock, 20 Wend., 47; Brooklyn Bank vs. DeGrauw, 23 Id., 342; Holton vs. Brown, 18 Vt., 224; Loring vs. Cooke, 3 Pick., 48; Frost vs. Yonkers' Sav. Bk., 8 Hun., 26; 70 N. Y., 553; 4 Camp., 156; 5 Esp., 48; Peake, 179; 2 Jones on Mort; secs. 900, 1088.

It is not clear that in the present case the tender by complainant or by his agents was free from such conditions as to justify the court in decreeing that the interest upon the note ceased thereafter. The testimony, on the whole, rather brings us to the conclusion that the tender was made conditional upon "the execution of a good and sufficient deed" and its delivery to Matthews, or a "demand of said note and a full compliance" of the contract made by Church.

The demand of the complainant that the money be accepted, and that the defendants execute a conveyance in compliance with the Church agreement, seem to have been coupled in such manner as to make the one a condition of the other.

The evidence of tender, in order to give it the effect of stopping the interest, must be "so full, clear, and satisfactory as to leave no reasonable doubt" that the tender was absolute and unconditional, and not dependent upon the delivery of the note or the execution of a discharge or a deed. The decree in this respect cannot be allowed to stand, and so much of it as relieves the complainant of interest upon $2,100 after the alleged tender must be reversed.

That clause of the decree providing for the sale of Matthews' interest in the lands unless payment be made, &c., is irregular. There is no prayer of the bill warranting it. Neither is there a cross bill in this case praying a foreclosure and sale. This portion of the decree is not assigned by the appellant as a special ground of reversal, but the whole decree is before this court, and we must direct that in this respect it be modified and corrected.

This cause is remanded with directions to modify an-

amend the decree in the respects indicated in this opinion. The decree being reversed in a material part, the costs of he appeal and subsequent proceedings in this court are adudged against the appellee.

ALEXANDER S. MERRITT, APPELLANT, VS. WILBUR F. JENKINS, ET UX., APPELLEES.

Upon remanding a cause to the Circuit Court, after the judgment of this court reversing its decree, it is not essential that the Circuit Court should enter a formal order setting its previous decree aside.

A decree being reversed and a cause having been remanded, with directions to take an account between trustee and *cestui que trust*, the court, in making the order of reference, should do more than simply use the general language of the mandate of this court in its order. The Chancellor should at least give directions that all just allowances and charges should be allowed the parties, and should declare the trust.

An executor and trustee is entitled in accounting with the *cestui que trust* and legatee to a credit for her proper proportion of the taxes chargeable against the trust estate and paid by him.

Where several things, such as bonds and lands, are subject to the same trusts in the hands of the same trustee, funds realized from either the bonds or the lands may be applied by the trustee to the payment of the taxes upon both or either.

Where a joint and several note of husband and wife, the wife being a legatee and *cestui que trust*, is given to the trustee as such, (he being also executor.) for the joint use of the land belonging to the trust, and the reasonable presumption in the case is that the credit was extended because of the responsibility of the wife and the relation of legatee and executor and trustee, her estate is in equity chargeable with the note.

In such case, she being a debtor to the trust estate, cannot withold from the trust estate that which she owes, and at the same time

have all that is coming to her. A legatee is not entitled to her legacy while she retains in her own hands a part of the fund out of which her own and other legacies are to be paid.

7. In stating his account, the master, in a case of this character, should allow interest up to the date of his report, and the decree should be for the balance found due by the master, with interest from the date of the report until paid, not for a sum of equal to the amount found due by the master with interest to the date of the decree.

8. In stating an account between trustee and *cestui que trust* of this character, charges paid by the trustee should be first deducted from the interest due upon the legacy up to the date of the charge. If the charge exceeds the interest, the difference is to be applied to the amount of the legacy due, and the balance will constitute the new principal. If the charge is less, the interest remaining over is not added to the principal, but the old principal remains and the excess of interest is added to the interest to be ascertained.

9. Where the trustee and executor holds the note of the *cestui que trust* and legatee, which note is less than the amount due the legatee, the principal and interest due from the trustee is first ascertained and from this the principal and interest of the note is deducted. The balance is the amount due.

Appeal from the Circuit Court for Jackson count.

The facts of the case are stated in the opinion of the court.

J. F. McClellan for Appellant.

D. L. McKinnon for Appellees.

MR. JUSTICE WESCOTT delivered the opinion of the court.

This is the second appeal in this case. Upon the former appeal the case was stated, and for the case up to a reversal of the decree dismissing the bill and remanding the cause, see 17 Fla., 304.

Upon the cause being remanded the Chancellor made a decree of reference to a master following the general language of this court without any specific directions.

quit claim deed of conveyance of the premises described in an agreement for partition entered into for the partition of said lands by and between the parties, upon payment by Matthews of said $2,488.33, with interest on $2,100 from the date of the decree at eight per cent. per annum; and that unless the said monies be paid within sixty days from the date of decree the defendants may have the interest of Matthews in said lands sold by the Sheriff, upon due notice, for the payment of said money. Upon Matthews tendering the money to defendants, or upon his paying the same into the registry of the court subject to the demand or order of defendants, they and each of them are enjoined from ever, in any manner, setting up any claims or demands in, to, or over said lands by reason of any of the matters complained of in the bill. It was further decreed that, upon such payment or tender by complainant, then all interlocutory orders, decrees, and proceedings in this suit shall be dismissed and vacated.

Further decreed that defendants pay the costs of this suit. Signed and entered June 8, 1878.

The defendants appealed from this decree upon the following grounds:

That the conveyance from Church to defendants gave them an absolute title to the estate, subject only to Matthews' right to purchase under the agreement signed by Church, and that under that agreement Matthews was simply a purchaser, and having failed to pay the purchase money on the day it was payable, he had no right to pay and demand a conveyance afterward;

That the relation of mortgagor and mortgage did not exist between the parties;

That the alleged tender, made after the money became payable, was not a lawful tender, and did not stop the accruing of interest, if the relation of mortgagor and mortgagee did exist;

r's report, which was confirmed, and upon which the final
decree was based, there were exceptions, which were over-
ruled, and the question now here is, were these exception
properly disallowed.

The first, second and third exceptions are because the
Master refused to allow as a credit to the executor and
trustee in the accounting one half of the sums he had paid
for taxes due upon the trust estate.

The trustee here had a right to a credit for one half of
all proper disbursements. This right exists as an incident
to the plaintiff's right to an account, an accounting being
the ascertaining of a balance due. Trustees have an inher-
rent equitable right to be reimbursed all expenses which
they reasonably and properly incur in the execution of the
trust, and it is immaterial that there are no provisions for
such expenses in the instrument of trust. Perry on Trusts,
§§907,910,913. If he has power of managing the estate,
and such power under this will, taking it altogether, is
clear, (so far as consistent with the contemplated coresidence
of the legatees upon the homestead,) he is entitled to all
the fair, reasonable and necessary expenses of keeping up
the estate. Taxes paid are certainly such expenses, and to
the extent that the legatee here is interested in the estate as
compared with the entire estate, to such extent must she
in this accounting be chargeable with these taxes, without
interest thereon. Because the bonds and the land are dis-
tinct subjects, does not prevent an expense incurred for the
protection of the lands, such as taxes, from being paya
out of funds realized from the bonds. They are each
ject to the same trusts in the hands of the same tru
Perry on Trusts, 907; 21 Beav., 508.

No other allowance is claimed.

The next exception overruled is because the Mas

fused to allow credit to the trustee for the amount and interest upon the following note belonging to the trust fund:

$75.00. MARIANNA, FLORIDA, January 29, 1877.

On or before the first day of January next we, or either of us, promise to pay to Alexander Merritt, trustee, or bearer, seventy-five dollars for one half of the land lying on the east side of the Chipola river near Merritt's bridge, and more particularly known as the old homestead of E. J. Merritt, deceased.

W. F. JENKINS,
S. E. JENKINS.

The consideration for this note was the joint use of the trust estate by her husband and herself. Here a part of the consideration enured to her benefit, and from the surrounding circumstances disclosed in the record, the only fair conclusion is that the note was taken in view of the relation of trustee and *cestui que trust,* as well as in view of the fact that moneys were coming to the trustee, from which this amount might be realized. It was then a contract for her benefit, upon the credit of her interest under the will, and a court of equity should allow the trustee to charge her separate estate with it. 7 Paige, 9; 20 Wend., 570; 22 New York, 265; 11 Ves., 596; 17 Ves., 365; 2 Story Eq., §1,400.

Where the promise and debt is on her own account, and here it is her several promise *to the trustee* as such, although her husband unites therein, as one of the makers of the note, and she or her separate estate receive a benefit, equity will lay hold of these circumstances and compel her property to respond to the engagement.

What is here to be charged is her income, and there is nothing in the nature of the trust under the will to prevent it. That income is in the form of a legacy in the hands of the executor whom she is calling to account, and the ex-

ecutor has a right to retain upon the principle that a legatee or distributee is not entitled to his legacy or distributive share while he retains in his own hands a part of the fund out of which his own and other legacies or distributive shares ought to be paid, or which are necessary to extinguish other claims on that fund. A legatee cannot withhold from the trust fund that which he owes, and at the same time have all that is coming to him. In no part of this trust estate has this legatee an interest independent of charges incurred in its management, nor has she a right to refuse to pay what she owes the estate, and at the same time have all of the money that is coming to her, and that is the whole of this case as now presented. It is against conscience that she should receive anything out of the fund without deducting therefrom the amount of that fund which is already in her hands as a debtor to the estate. 2 Barb. Chy. Repts, 533; 2 P. Wms., 128; 5 Ves., 243.

The next exception overruled was because interest was allowed since the filing of the bill.

The interest in this case should be calculated up to the Master's report. In order that there may be no misconception as to the rule to be adopted in this case we will state it fully.

The plaintiff is entitled to simple interest from the date each annual payment became due up to the date of Master's report. The defendant is entitled in this case to no interest upon the amounts paid by him for taxes, and which are chargeable against the legacy. These payments do not exceed in any case the amount of the annual sum due. The Master should calculate the interest upon the legacy up to the time that the payment for the tax is made. To the discharge of this interest the amount of the tax is to be applied. If it exceeds the interest then due, then the excess is to be applied to the principal of the legacy, and what remains will constitute a new principal upon

which the interest is to be calculated. If the amount paid for taxes is less than the interest due, then it is to be deducted from the interest, but the excess of interest is not to be added to the principal. The interest is to be continued upon the same principal, up to the date of the report. Thus applying the payments for taxes, the Master will find the aggregate indebtedness, principal and interest, due the legatee. From this sum he will deduct the amount of the note of the legatee with interest to the date of his report, and that sum will be the balance due by the defendant. Seaton on Decrees, §59; 2 John. Chy. Rep., 213; 1 Barb-Chy. Prac., 515, 516; 2 Fla., 445.

The decree should be for the sum found due by the Master, to bear interest from the date of the Master's report to the day of payment, and not for such a sum as is equal to the amount of the Master's report with interest thereon to the date of the decree.

As to the remaining portion of the decree to which exception is taken, we will say that it is the duty of this trustee to make the annual payments in accordance with his trust, all due allowances being made him for proper and necessary expenses and charges so long as Miss Anna Maria Merritt lives, and Mrs. Sarah E. Jenkins resides upon the place and is willing to comply with the condition of the legacy so far as it is her power to do so.

In reference to the question of contempt brought to our attention, we cannot presume that the defendant in this case will fail to pay the money to be found due upon an accounting which allows him all he asks to the items, and for that reason we will say nothing of it. So far as it enters into the present decree, it fails by its own limitation with the decree.

The decree is reversed and the case will be remanded for further proceedings consistent with the two opinions herein rendered, and conformable to law and equity in this behalf.

N. D. PHILLIPS, APPELLANT, VS. JOHN W. CRICHTON, ET AL., APPELLEES.

1. The court of chancery has no jurisdiction of a bill to enjoin a defendant in execution from selecting and making a *claim* of exemption of personal property levied upon by the sheriff. The right of possession involved can only be tested in a court of law.

2. An act of the Legislature making the sale of exempt personal property a felony, though it may operate to produce timidity on the part of the sheriff and cause him to decline to sell property claimed to be exempt, does not operate to invest a court of equity with a jurisdiction to inquire into the right to levy and sell.

Appeal from the Circuit Court for Alachua county.

The facts of the case are stated in the opinion of the court.

Thrasher, Davis & Hampton for Appellant.

E. C. F. Sanchez for Appellees.

THE CHIEF JUSTICE delivered the opinion of the court.

... his bill in equity alleging that he obtain ... which the sheriff levied u ... and corn of de ...

dismissed the bill for want of equity, whereupon complainant appealed.

If the allegation of the bill is true, that the defendant in attachment was not the head of a family residing in this State, no such exemption can be claimed by him, and no legal impediment exists against the subjection of the property to the payment of debts, and the defendant cannot lawfully prevent it. The statute of 1869 (chap. 1715, sections 7 and 8) provides a mode by which the head of a family residing in this State may have an appraisement of all his personal property and select from it so much as he *claims* is exempt from levy and sale. [It was said in the opinion in Haynes vs. McGehee, (17 Fla., page 162,) that sections 7 and 8 "provide a method of ascertaining what personal property is exempt." What I desired to say was, that the law gives the party a means of making selection of property *claimed* as exempt.] The act does not provide how the questions of fact entitling a party to the exemption are to be determined, as to personal property. The party cannot determine it, and the sheriff cannot. It depends upon matters of fact to be determined by the courts of law.

It has long been the settled rule that the courts of chancery will not, except in peculiar cases, entertain questions of trespass or other controversies respecting the possession or title of personal property, where an adequate remedy can be had at law. The exceptions are when the property has some quality or character, the loss of which cannot be adequately compensated for in damages, as when they are articles of great antiquity, or family relics, ornaments, heir looms, &c., whose peculiar value, as such, cannot be estimated in money. See 1 Story's Eq. Jur., 708, 709; Haynes vs. McGehee, 17 Fla., 159.

But the appellant insists that an act of the Legislature, chapter 1944, being an act to amend an act providing for setting apart exempt property, &c., approved February 24,

1873, (which provides that if a sheriff or other officer shall levy on and sell any personal property exempt from forced sale, he shall be guilty of a felony and severely punished,) renders it so dangerous to levy upon and sell personal property that sheriffs will not venture to sell, when a claim of exemption is made, and places a creditor at an unfair disadvantage, from which he can only be extricated by the present form of proceeding in a court of equity. It is not correct, however, to assume that because the Legislature may have, unintentionaly or otherwise, created obstacles in the way of the ordinary enforcement of judicial process, (as by increasing the personal hazard of the sheriff,) that a court of equity can assume legislative powers for the purpose of avoiding such obstacles, and create a jurisdiction which it had never had, and which the Legislature had not conferred. If the Legislature had made it a felony in a sheriff to serve and execute legal process, it cannot be said that chancery acquired by such legislation any additional field for the exercise of its jurisdiction. See Finnegan vs. City of Fernandina, 15 Fla., 379, 383.

We undertook in Loring vs. Wittich, 16 Fla., 498,507, to indicate some of the existing legal remedies in a case of this kind, remedies that yet exist, and it is not necessary to repeat the suggestions there made.

Counsel for appellant insists that in Loring vs. Wittich, the court considered and passed upon the merits of that case, which was similar to this. In that case, however, the Circuit Judge had granted an injunction restraining Loring and the sheriff from further attempts toward an appraisement and selection upon a claim of exemption, the ground of the injunction being that Loring, the defendant in execution, had not in his affidavit and in his answer stated that he was the head of a family residing in the State. While we did proceed to show that we thought he had stated that fact substantially and in proper terms, to

entitle him to have an appraisement made and that if his answer was true he might interpose a "claim" of exemption, and this court reversed the decree which in terms declared the property liable to levy and sale, and enjoined any further claim or proceeding to exempt it, we also took occasion to suggest the question whether the suit in equity could be maintained, although that question was not considered in the argument of the case or in the disposition of it. Had this court sustained the injunction, it might well be said that we had sustained the equity jurisdiction.

In the several cases heretofore presented to this court, where this question has occurred, the jurisdiction has uniformly been denied, upon the ground that an adequate remedy existed at law, and there is no legislation extending it to the court of chancery. Finnegan vs. City of Fernandina, 15 Fla., 379; Byan vs. Long, 14 Fla., 366; Haynes vs. McGehee, 17 Fla., 159.

The decree of the Circuit Court dismissing the bill is affirmed, with costs against the appellant.

Mr. Justice Westcott did not sit in this case.

WILLIAM G. CHRISTOPHER VS. URIAH BOWDEN, SHERIFF, ET AL.

1. A court of equity has no jurisdiction of a bill filed to enjoin parties and sheriff from proceeding to appraise and claim the exemption of personal property, levied upon by *fi fa.*, even though it be alleged that the judgment and execution are for the purchase money of the property.

2. The appraisement and selection of personal property, claimed to be exempt from levy and sale, do not determine whether the property

is lawfully exempt. That question is for a court of law to determine.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

A. Doggett for Appellant.

C. P. Cooper for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

The bill alleges that Appellant sold to Pickett a number of oxen, and took, to secure the purchase money, a promissory note, which note not being paid at maturity, was put in judgment against Pickett, and execution thereon issued to the sheriff, who levied upon some of the identical oxen, whereupon Pickett makes a claim that the oxen are exempt from levy and sale, notifies the sheriff, and the sheriff is about to take measures to inventory and appraise the property to the end that Pickett may make a claim of exemption. Complainant claims that the judgment being for the purchase money, the property cannot be claimed as exempt, as he has a specific lien upon it therefor, under the Constitution and laws, and prays that an injunction may be granted restraining proceedings under the claim of exemption and from releasing the oxen from the levy. Defendant moved to dismiss the bill which was granted, and the bill was dismissed, whereupon complainant appealed.

Counsel argue and submit the question whether, under the constitutional provisions in respect to exemptions, the seller of personal property has not a right to assume that the purchaser cannot claim exemption of goods from sale for the purchase money. But this is not a bill to foreclose a specific lien, as for purchase money, and therefore the question cannot arise here for determination.

We have heretofore held, and upon further consideration must still hold, that a court of chancery has no jurisdiction of a bill to enjoin parties from making a *claim* of exemption of personal property, levied upon under a *fi. fa.* or attachment. It is a question of the right of possession of the property. If the sheriff, after appraisement and selection, still holds and refuses to deliver it to the defendant in execution, the defendant may sue for it, or its value, and thus try the question. If the sheriff surrenders it he is liable to the plaintiff in execution, unless the property is lawfully exempt. The appraisement and selection of property *claimed* to be exempt does not determine the question of its liability to levy and sale. The jurisdiction of chancery has been denied in the following cases: Haynes vs. McGehee, 17, Fla., 159; Bryan vs. Long, 14 Fla., 366; Phillips vs. Chrichton, 17 Fla., (decided at the present term,) and the principle is considered in Finnegan vs. City of Fernandina, 15 Fla., 379.

The decree dismissing the bill is affirmed.

JOHN W. PRICE, APPELLANT, VS. ALEXANDER P. PRICE ET UX., APPELLEES.

Payment of the purchase price of land, upon a parol agreement to convey, no other act being done by either party under the agreement, is not enough to take the case out of the statute of frauds, and a court of equity cannot decree a specific performance.

Appeal from the Circuit Court for Alachua county.

The facts of the case are stated in the opinion of the court.

Thrasher, Davis & Hampton for Appellant.

for Appellees.

CHIEF JUSTICE delivered the opinion of the court.

This is a bill filed to compel a specific performance of a verbal agreement for the sale and conveyance of land. The bill alleges that the complainants (appellees) conveyed to appellant one hundred acres of land, and in consideration of such conveyance appellant agreed, verbally, to convey to Mrs. Price, one of the complainants, a certain forty acres described in the bill, but that appellant afterwards refused to convey to her the forty acres. The bill then prays that appellant may be decreed to execute a deed according to his agreement. There is no allegation that appellant put complainant, in possession of the land, or that they have been in possession, or that they have made any outlay or improvements on the land described.

After answer and replication, testimony was taken by both parties and a decree was entered directing appellant to convey the land as prayed and that he pay the costs.

From this decree an appeal is taken.

Without reference to the testimony, and upon the statements of the bill alone, the prayer should have been refused.

Payment of the consideration or purchase price of land upon a parol agreement to convey, is not sufficient to take the case out of the statute of frauds.

This doctrine was so fully considered in Tate vs. Jones, 16 Fla., 216, that we will only refer to that case for the rule upon this question. If the consideration was paid and nothing else was done toward carrying out the verbal contract, the purchaser can only have a remedy at law to recover the purchase money.

The decree is reversed and the bill must be dismissed with costs.

JOHN BROWNE, APPELLANT, VS. ADALINE BROWNE, ET ALS., APPELLEES.

1. A suit in equity to sell land mortgaged, and to apply the proceeds thereof to the payment of a promissory note secured by the mortgage, is an action upon a contract founded upon an instrument of writing under seal within the meaning of the tenth section of chapter 1869, of the Laws of Florida, entitled "An act of Limitations in Civil Suits," approved February 27, 1872, and such suit can be maintained in equity, notwithstanding an action at law upon the note is barred.

2. Amending a pleading after demurrer overruled thereto, is a waiver of the demurrer.

3. Chapter 2004, Laws, which requires that the original mortgage or a certified copy of the same shall form a part of the bill of complaint, contemplates a copy certified by the officer authorized by law to make a certificate of the character named.

Appeal from the Circuit Court for Alachu county.

The facts of the case are stated in the opinion of the court.

R. W. Davis, W. W. Hampton, P. H. Thrasher for Appellant.

1. On the 29th October, 1878, complainant (appellant) filed his bill in chancery against defendants (appellees) to foreclose his mortgage upon certain lands therein described, the mortgage being given to secure the sum of two thousand five hundred dollars evidenced by mortgage and a note for that sum and of even date with mortgage.

2. On April 7, 1879, defendants demurred to complainant's bill because neither the original nor copy of mortgage had been attched, and because there was no equity in bill, and complainant was not entitled to relief sought. Demurrer was sustained, and complaint amended by

adding original mortgage in compliance with order of court.

3. On September 17, 1879, complainant, after notice to defendants, asked the chancellor for a decree *pro confess* which the chancellor denied, and gave defendants 20 da to answer, plead or demur.

4. On October 4, 1879, defendants filed their plea of t statute of limitations, and alleged "that the note sued in complainant's bill did not accrue within five years n before filing and exhibiting of complainant's bill." A further, that Sarah R. Barnes, Thomas H. Barnes a Louisa S. Barnes, "say that said note sued on, is not th act and deed."

5. On the 21st October, 1879, the said bill and plea (after notice and upon appearance of all parties) was heard before the chancellor, when the plea was sustained.

6. From this ruling and decision an appeal was made to this court, December 16, 1879.

We do not discuss the first, second and third assignments of error, these being mere interlocutory matters which can have little effect upon the merits of this appeal. To the fourth and fifth asisgnments only we address ourselves.

Under the statutes of Florida, a mortgage, being an instrument under seal, is not barred until after the lapse of twenty years. Acts 1872, (chap. 1869,) 22.

Is the right to foreclose a mortgage barred because th note, which it is given to secure, is barred? It certainly not.

"The fact that the debt secured by a mortgage is bar by a statute of limitation, does not necessarily, *or as a eral rule*, extinguish the mortgage security, or prevent maintaining of an action to enforce it. The statu limitations does not in any way apply to the mortga curity." Jones on Mortgages, §1202.

"The debt and the mortgage are distinct causes

tion, and distinct remedies may be pursued upon them." Jones on Mortgages, §1203; 42 Cal. Rep. 493; 26 Cal. Rep., 141.

"A debt secured by a mortgage is not barred until the statute has run against the mortgage." Almy vs. Wilber, 2 W. & M., 371; 1 Brightly's Dig., 552, (Limitations.)

"The fact that a note is barred by the statute, does not estop the holder from proceeding on the accompanying mortgages—the bar of the statute does not extinguish the debt." 1 Brightly's Dig., 552, (Limitations); Sparks vs. Pico, 1 McA., 497.

"With us the limitation of actions is regulated entirely by statute, the mere lapse of time not being at common law, pleadable in bar thereof." 2 Chitty on Contracts, 1214, (last Ed.)

Among the first English statutes upon this subject was 21 Jac. I., c. 16, which enacts "that all actions of account and upon the case, * * * and all actions of debt grounded upon any debt or lending, *without specialty,* and all actions of debt for arrearages of rent, shall be commenced and sued within six years," &c. 2 Chitty on Contracts, 1215, (last Ed.)

It will be observed that even in this enactment a *specialty* is excepted. A mortgage or lien is defined in law to be a *specialty.* See Bouv. Dict.

"But," says Chitty, "this statute does not discharge or extinguish the debt, it only bars the remedy, and accordingly it is held that a lien in respect of the debt is not destroyed though the remedy by writ, to recover the debt itself, may be gone." 2 Chitty on Contracts, 1215, (last Edition.)

Our own statute is similar in effect to the English statute. It does not extinguish the debt. Its language is: "Actions other than those for the recovery of real prop-

rty can only be *commenced* as follows:" * * * Act 1872, page 21.

We quote from Parsons on Contracts: "The statut only declares that no action shall be *maintained,* but n that the cause of action is made *void.* Hence, althoug the remedy by action is lost, *a lien is not lost.* If one hol a note, against which the statute has run, and also a mor gage or pledge of real or personal property to secure it, cannot sue the note, but can take or hold possession of t property and sell it, if it be personal, with proper prec tions, *or have a bill in equity to foreclose his mortgage.* And if his lien, whatever it may be, fails to pay the whole amo nt of the note, he loses the remainder, because he can h ve no action *upon it* although he may have proper proc ss, founded upon the debt *and the security,* to establish his lien and make it available in payment of the debt." 2 Parsons on Contracts, (third Ed.,) page 379, sec. 8; 32 Miss. Rep., p. 212.

This court in Buckmaster vs. Kelly et al., 15 Fla., Rep., 180, have thoroughly discussed this question, and there decide that nineteen years will bar a mortgage where note was barred. The court, however, seems to have been governed by *"the other numerous circumstances going to show presumption of payment."* Particular attention is called to second paragraph, page 198 of this decision. 15 Fla. Rep., 180.

In support of the theory of the above cited case we make this reference: "The presumption from lapse of time that will bar a mortgage when the mortgagee is in possession, &c., * * * is a mere presumption which may be repelled by circumstances." 29 Grattan Rep., 27.

But in this particular mortgage appellant claims that outside the note, there is an independent covenant to p the debt. We invite the atetntion of the court to the p *viso* in the mortgage. The distinct language used is t

the mortgage is to become void "*when the party of the first part shall pay to the party of the second part the sum of two thousand five hundred dollars in eighteen months after date hereof.*" After this distinct covenant the mortgage continues, "as well also the amount of promissory note," &c.

"It is conceded, however, that when the mortgage itself contains a covenant for the debt, this being an instrument under seal, although a mortgage note not under seal might be barred under a shorter period of limitations than that required to bar a sealed instrument, the remedy upon the mortgage would be barred *only by lapse of the longer period* required to bar a recovery on sealed instrument." Jones on Mortgages, §1207, (latter clause); 28 Ill. Rep., 44.

In Wilkinson vs. Flowers, 37 Miss. Rep., 579, Putnam J. says: "A reference to the *condition* contained in the mortgage shows that it is to remain in full force until the *debt shall be paid.* The creditor has a double remedy; one upon the deed to recover land; another upon the note to recover judgment and execution for the debt; and it does not follow that he cannot recover upon the one, although some technical difficulty or objection may exist as to his recovery upon the other. *The debt remains* although the statute of limitations may discharge the remedy upon the note." 37 Miss. Rep., 579; 32 Miss. Rep., 212.

It is contended in the supplemental brief of Mr. Hilton, counsel for appellees, that our statute of limitations is borrowed from California, where, he claims, it had existed for twenty years before being adopted in Florida. That, therefore, the constructions given the statute by California courts is binding here.

How the learned gentleman arrives at the conclusion that our statute is borrowed from California, we cannot understand. There are, perhaps, no two States in the Union whose statutes of limitation are more dissimilar than those

of Florida and California. For the Califronia statute, see California Code Procedure, §335, 341.

In California no discrimination is made between sealed and unsealed instruments, but they are all controlled by the sweeping clause of "contract, obligation or liability upon an *instrument of writing* executed in this State." *Ibid.*

Our statute is vastly different and discriminations are made between different classes of *writing*.

Jesse H. Goss on same side.

R. B. Hilton for Appellees.

In the Bank of the United States vs. Daniel, 12 Peters, on page 56, the court used this language with reference to the application of the statute of limitations to a suit in chancery then before them:

"The courts of law and equity have concurrent jurisdiction, and the complainants having elected to resort to equity, which they had the right to do, were as subject to be barred by the statutes, by the one court as in the other. In such cases the courts of equity act in obedience to the statute of limitations, from which they are no more exempt than courts of law."

The general proposition which I maintain as founded upon principle and sustained by abundant authority is that wherever a party has the alternative for the adjudication of his rights of a resort either to a court of law or of equity, the statutory period which would preclude his success at law will be equally fatal to him in equity.

In England, and in this country, when not otherwise restricted by statute, as against the mortgagor in possession the mortgagee has three remedies. He can sue at law on his note or bond, for the security of which the mortgage was given; bring ejectment to obtain possession of the land, or go into equity for the foreclosure of the right of

redemption. In this State, since the statute of 1853, (chapter 525,) his remedies are but two; action on the note or bond at law, or suit in equity for foreclosure. In either case satisfaction of the debt is the object which, if not otherwise satisfied, is obtained by sale of the mortgage property. In either case it is a suit for the recovery of money.

Neither in England, nor in those American States in in which the remedy by ejectment lies, can foreclosure be had after the lapse of such time as bars ejectment, or in other words tolls the right of entry. So long as the statute of limitations permits ejectment, so long will equity, acting on the analogy of the statute, permit a foreclosure and no longer.

The only legal remedy in Florida being an action on the note, maintainable only within the statutory period of five years, in this State foreclosure must also be brought within five years from the maturity of the debt.

It is admitted that in many of the States (and the same was doubtless true in Florida prior to the statute of 1848, fixing seven years as the limitation of actions for the recovery of lands) a suit for foreclosure may be brought at any time within twenty years. But it is because that is the limit for ejectment in those States.

But in other States, where ejectment is limited to less than twenty years, as in Connecticut—1 Day, 124; Vermont, 19 Vermont, 526; Arkansas, 16 Arkansas, 145; 21 Arkansas 371; Mississippi, 30 Mississippi; 32 Mississippi, 215—foreclosure is restricted to a corresponding period.

For decisions in States holding specific terms that the statutory period for the recovery on the note having expired, there can be no foreclosure of the mortgage, see Pollock vs. Morrison, 41 Ill., 516; 38 Ill., 44; Schmucker vs. Sibert, 18 Kans., 104; 12 Texas, 427; Perkins vs. Sterns,

23 Texas, 561; Lord vs. Morris, 18 Cal., 482; Kayger vs. Riley, 2 Neb., 20.

In Dearman vs. Wyche, 9 Simons, 592, on the plea of the statute of limitations (3 and 4 Will. 4,) to a suit in equity for foreclosure, the Vice-Chancellor (Shadwell) said: "It seems to me, although I am sorry to be obliged to do so, that I must allow this plea; for, although it has been said that a bill of foreclosure only seeks the exclusion of an equity, yet it is in substance a suit in equity for the recovery of money. If the opinion of any counsel were asked how money due upon a mortgage could be got in or recovered, he would at once advise a bill of foreclosure. It is a suit to recover money, and * * * I think the plea is good."

When the same case came up for further hearing, the plaintiff having amended his bill, the Vice-Chancellor used this language: "Where it is evident that the only claim which a party has to the assistance of a court of equity is that as mortgagee he is entitled to require the interference of the court to remove legal impediments to his recovering what he is entitled to in a court of law, and the court sees that his remedy at law is barred, it will not interfere to assist him. * * * If the plea is right, the plaintiffs are precluded from recovering the mortgage money in a court of law; and this court will not assist them to recover what it sees they have no right to recover. I think the plea is right, and that it must be allowed."

Says, Judge Sawyer of the United States Circuit Court, "Statutes of limitations operate upon the subject matter, not the form of the action or the tribunal." Hardy vs. Harbin, 4 Sawyer, 536, (U. S. Dig. 1878, p. 473).

"When the relief sought in equity is not more comprehensive than that which might have been obtained in an action for money had and received, the complainant is bar-

red, as he would have been at law by the statutes of limitations." Tiernan vs. Rescariene's adm'r 10 G. & J.

This court, in Pasco vs. Gamble and Poole, 15 Fla., 562, commenting on our mortgage act of 1853, says "the relation between mortgagor and mortgagee is essentially changed." This is unquestionably true; equity had not before that time brought about a greater change in the ancient common law doctrines in regard to the mortgages than did this statute in the relative rights of the mortgagor and mortgagee as existing in Florida at the date of its passage.

Finally, as to the argument founded upon the "condition" or defeasance contained in the mortgage, I submit that the condition in a mortgage, now altogether superfluous, is purely for the benefit of the mortgager. Under it the mortgagee can possibly claim nothing.

OUR STATUTE OF LIMITATIONS AS CONSTRUCTED BY THE COURTS OF THE STATE FROM WHICH WE ADOPT IT.

I have referred to the decisions in California in support of the defense set up by the appellees. (See Lord vs. Morris, 18 Cal., 482; U. S. Dig., 1862, p. 405; Arrington vs. Liscom, 34 Idem, 363; McCormick vs. Brown, 36 Id., p. 180.) It is from that State we derive our statute of limitations, where it had been in force for more than twenty years prior to its re-enactment in Florida, and again and again passed upon by her highest courts in its application to mortgages. I invoke then the following well established principle *as conclusive*: *"Where one State borrows or adopts a law from another, it is well settled that the judicial construction given to the statute in the State where it originated follows it to the State of its adoption."*. Benis vs. Becker, 1 Kan., p. 348; Cooley Con. L., 3 Ed., p. 53, and numerous authorities there cited.

"It is a common reasoning that the adjudged construc-

tion of the terms of a statute is enacted, as well as the terms themselves, when an act which has been passed the Legislature of one State or country is afterwards passed by the Legislature of another." 3 Gray, 451.

This rule applies with peculiar force in the present instance, because the construction given to the act by the California courts is the only one which can harmonize with our law of mortgages. (Chap. 525.) And when the Supreme Court of that State, in Lord vs. Morris, *supra*, having declared that "where an action on a promissory note secured by a mortgage is barred by the statute, the mortgagee has no remedy upon the mortgage," they added, "this is the law under the peculiar statute of limitations of California, which differs so materially from other statutes that decisions under them contrary to this rule do not affect it." They said what it seems to me this court, with even stronger reasons, will say.

R. F. Taylor and *E. C. F. Sanchez* on same side.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

On the 29th of October, A. D., 1878, John Browne filed his bill in the Circuit Court of the State of Florida for the Fifth Judicial Circuit in the County of Alachua, against Adaline Brown, Louis A. Barnes and Sarah R. Barns, his wife, Thomas H. Barnes and Louisa J. Barnes, his wife, and Elizabeth G. Goldsmith, heir at law and administratrix of Jeremiah Goldsmith, deceased, seeking to foreclose a mortgage upon real estate therein mentioned, executed on the 20th of April, A. D., 1867, by Leonard L. Browne, Adaline Browne, Louis A. Barnes, Susan J. Park, John

H. Park and Jeremiah Goldsmith, to secure a note in language as follows:

$2,500. GAINESVILLE, FLA., February 4, 1867.

Eighteen months after date we promise to pay John Browne, or order, two thousand five hundred dollars, with interest at 7 3-10 per centum, value received.

LEONARD L. BROWNE,
JOHN H. PARK,
JEREMIAH GOLDSMITH,
LOUIS A. BARNS.

There was demurrer to the bill on the ground that neither the original mortgage, nor a certified copy thereof, formed a part of the bill of complaint. The demurrer was sustained with leave to plaintiff to amend. The amendment made was the filing of a certificate by one of plaintiff's attorneys, that the mortgage attached to the bill was a copy of the original mortgage. This amendment was stricken out, and the original mortgage was thereupon, by leave of the court, filed and attached to the bill.

The ruling of the chancellor upon the demurrer is the first error sasigned. The plaintiff having amended his bill after this ruling upon the demurrer, cannot be heard here to question its correctness. The striking out the certificate of plaintiff's attorney was proper. The law contemplates a copy of the mortgage, certified by the officer authorized by law to make a certificate of the character named. A certificate of an attorney is not contemplated by the statute. This disposes of the first and second grounds of appeal as stated in the petition of appeal.

The third ground stated is because the chancellor erred in his order of September 17, 1879, in denying complainant's motion for a decree *pro confesso*. There is no such motion in the record.

The remaining grounds of appeal, as stated, are based

upon the rulings of the chancellor, pronouncing the following pleas good:

First. That the promissory note mentioned, set out, and sued upon in the complainant's bill of complaint for the sum of two thousand five hundred dollars, which bears date the fourth day of February, A. D., 1867, and is attached to complainant's said bill as a part thereof, and is referred to therein as exhibit A, and which is the foundation of the complainant's bill herein, for the collection of which the said bill has been exhibited against these defendants, did not accrue within five years next before the filing and exhibiting of the said complainant's said bill against these defendants, and that the said complainant is estopped and barred by the statute of limitations of the State of Florida fro mfurther claiming or collecting the said promissory note sued upon in the bill herein, or any part thereof.

Second. And the said defendants, &c., say that the said promissory note sued upon in the bill herein is not their act and deed; and that they, nor either of them, have ever undertaken and promised in manner and form as is alleged; and that they, nor either of them, have ever been in any way bound or obliged to pay said note, or any part thereof, all which matters and things, &c.

Treating the first plea as it has been treated in argument, that is, as setting up a limitation of five years as a bar to this suit, the question here presented is whether in this State five years is a bar to a suit in equity to subject to sale real estate mortgaged to secure the payment of a sum due, as shown by a promissory note named in the mortgage Our statute provides that a civil action upon any contract, obligation or liability, founded upon an instrument of writing under seal, shall be commenced within twenty years after the cause of action shall have accrued; and that a like action upon any contract, obligation or liability, founded upon an instrument of writing not under seal, shall

be commenced within five years after the cause of action shall have accrued.

It is thus apparent that if this is an action upon a contract, obligation or liability, founded upon an instrument of writing under seal, within the meaning of the statute, this is not a good plea.

The question here, therefore, is: Is a suit in equity upon a mortgage of real estate to subject the mortgaged property to sale, and to apply the proceeds to the extinguishment of the mortgage debt, such a civil action? In considering this question it must be remembered that this statute of limitations was passed when the code of practice was in force, under which the term civil action embraced both actions at law and suits in equity.

There are conflicting decisions upon many of the very interesting questions in reference to mortgages which have been alluded to in argument at bar; but as to this precise question, which is really the only question in the cause, we find no conflict in the views of the courts.

An action of similar character to this is found in 29 Barb., 285. In that case the Supreme Court of New York, in speaking of the nature of the action, say: "If this is substantially an action upon the note, then it is barred; for it is an action upon simple contract, and must be brought within six years. (Code, §90.) And the plaintiff in such case fails, not because the debt is in fact shown to be paid, but because the law forbids the action. The *remedy is taken away*. But this is not in terms or effect an action upon the *note*, * * * and I think here a distinction may be drawn between an action upon the note for the purpose of enforcing a personal liability and an action upon the mortgage for the purpose of enforcing the lien upon the real estate."

The Court of Appeals of New York, (15 N. Y., 510,) speaking of the character of an action similar to this, says: "The action to foreclose a mortgage is brought upon an in-

strument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and, by reason of the seal, the debt is not presumed to have been paid until the expiration of twenty years after it becomes due and payable. The six years' limitation has no application to a mortgage. In fact, all instruments under seal are expressly excepted therefrom."

These views of the courts of New York are very important and of great weight in determining the nature of this suit when the statute of limitations of that State is examined and considered with reference to our own statute. There was a limitation of six years to all "actions of debt founded upon any contract, obligation or liability not under seal," and a like limitation to all actions of account or assumpsit founded on any contract or liability express, or implied. (2 R. S., 244.) These limitations, it will be seen, are held to be inapplicable to a suit to subject mortgaged property to sale. It will also be seen that a suit of this character is held to be embraced within that section of the statute which reads as follows: "After the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period."

If an action upon a mortgage is an action upon a sealed instrument for the payment of money, within the meaning of this section of the statute in New York, it is as clear as any proposition can be that an action upon a mortgage in Florida is an action upon a contract, founded upon an instrument of writing under seal. In speaking of the nature of an action upon a mortgage as distinguished from an action on the note which the mortgage was given to secure, Warner, J., speaking for the Supreme Court of Georgia,

(8 Ga., 326,) says: "Because the remedy on the note is barred by the statute in six years, it does not follow that the creditor's remedy on the mortgage, being a sealed instrument, is also barred. The creditor's remedy on the mortgage is not barred until twenty years." The Supreme Court of Wisconsin, in speaking of the same subject, (21 Wis., 329,) says: "The action to foreclose is upon an instrument under seal, which acknowledges the debt, the payment of which it is given to secure. And it being thus under seal, the equitable remedy upon it is not lost, although an action upon the note may be barred."

It is thus seen that this case is embraced with a very narrow compass. Is the remedy upon the mortgage a sealed instrument by which a sale of the land, no matter in whose possession it may be, is had, a distinct and different thing from the remedy upon the note by which a general judgment against the maker thereof alone is had? Is the act of resorting to a court of equity to sell the mortgaged premises an action upon a contract, founded upon an instrument of writing under seal? These are the questions to be determined. It seems to me to be perfectly clear that there is a marked difference between an action for the sale of the land on the one hand, and an action for a general judgment on the other; and it is also very plain that the action upon the mortgage is upon a contract founded upon an instrument under seal. The action upon the note is a personal action, sounding in damages only. The action upon the mortgage is a proceeding to subject the subject-matter of the mortgage contract, the land, to sale. They are proceedings governed by different rules. They reach different ends. True, the consideration for each may be the same, but because the debt may be evidenced as well by the note as by the mortgage does not make the one identical with the other. Being similar in so far as they each constitute

evidence of the debt, does not necessarily make them alike in other respects.

Our view is that, in this State, the letter of the statute covers the case; that a limitation by it, applicable to this suit, is found in the letter of the law; that there is no room for argument based upon the views expressed by courts acting by analogy to limitations at law, or upon presumptions of payment by lapse of time, or upon the theory that a mortgage is an incident of the note, and when the remedy upon the note is barred the remedy upon the mortgage, its incident, is gone, or upon other rules established by courts based upon a legislative enactment or policy different from that announced in this statute.

In this connection our attention has been called to the statute (chap. 525, laws,) of this State entitled "An act to amend the laws now in force in relation to mortgages," approved January 8th, 1853.

The effect of this statute is not to take away any remedy in equity. It takes away the legal right of possession from the mortgagee and places it in the mortgagor, but as held in Gamble vs. Pasco, 15 Fla., 562, the possession of the mortgagor is subject to be controlled in a court of equity when he is guilty of acts inconsistent with such possession. That case in no degree limits the equitable rights or remedies of the mortgagee. On the contrary, the equitable right of the mortgage under certain circumstances to have a receiver of the mortgaged property, notwithstanding the fact that at law the statute takes away all legal right of the mortgagee to his ejectment, or other action at law by which he can obtain possession, is sustained. So far as the remedy by suit in equity for the sale of the mortgaged land is concerned, the statute provides expressly that mortgages shall be held subject to the same rules of foreclosure, to the same regulations, restrictions, restraints and

forms, as "now are, or hereafter may be prescribed by law in relation to mortgages."

There is in this State no method either at law or in equity by which a mortgagee can be adjudged absolute owner of the mortgaged property; in other words, we have no strict foreclosure. His equitable remedy here is a sale of the property to pay his debt, and his rights at law are confined to actions personal upon the debt and the summary remedy under the act to regulate the foreclosure of mortgages by the courts of common law. This last proceeding has been called "an anomalous one for which neither the courts of common law nor equity furnish a precedent." It has been held, however, that after a judgment in a common law suit upon the debt, he cannot obtain another judgment under the statute, and a judgment under this statute is called "a judgment at law," (2 Fla., 184,) and in Georgia, as to a similar statute it has been held that although the remedy upon the note in a simple action at law may be barred, this special remedy "on the mortgage, being a sealed instrument," is not barred. 8 Ga., 325.

If the expiration of the time limited at law as the period within which an ejectment might be brought would in equity have created a presumption of payment of the mortgage debt, anterior to this statute, a question never passed upon in this State, then upon the abolition of the right at law, in analogy to which the court of equity created this presumption, it seems to me as a matter of course that the presumption so far as it was based upon the existence of the rule at law, must pass away with it.

In the absence of the provision of the statute fixing a limitation to this suit, and of the section of the statute (12) limiting all actions for relief not expressly provided for in the other sections, (for we think this section (12) would otherwise embrace this action, 24 How., 285,) then there would be either no rule of limitation in analogy to

which a court of equity would act or the rule would be the limitation upon the note. We do not think, however, that that rule would be adopted as an absolute bar, (these not being cases of concurrent jurisdiction,) to the equitable remedy upon the erroneous idea sometimes announced that the limitation of the remedy destroys the debt, but that the expiration of the time would simply create a presumption of payment, that presumption being of matter of fact liable to be overthrown by proper evidence. In cases of concurrent jurisdiction, where the statute bars the remedy at law, there a court of equity, acting not by analogy, but in obedience to the statute, makes the limitation a bar to the equitable remedy equally as effective and extensive as the statute bars the remedy at law, but in cases other than those of concurrent jurisdiction, such as actions of ejectment, writs of right and real or possessory actions, and actions upon the note, and a suit in equity to subject the land to sale, where the jurisdiction is not concurrent, the statutory limitation is adopted by analogy, the court of equity conforming itself to the public policy, evidenced by the statute, and adopting that period as the time in which payment and satisfaction *is presumed*.

This distinction in the matter of jurisdiction is well illustrated by the case in the Supreme Court of the United States, city by respondents here, as the basis of their argument, (12 Peters, 56,) and the case of Cleveland Insurance Company vs. Reed et al., 24 How., 287. The case in 12 Peters was a case of concurrent jurisdiction. It was a bill in equity seeking partial relief against a bill of exchange, and judgment thereon asking an injunction to restrain the collection of an alleged excess which entered into the judgment through mistake. The Supreme Court of the United States as to this case say: "The courts of law and equity have concurrent jurisdiction, and the complainants having elected to resort to equity, which they had the right

to do, were as subject to be barred by the statute in the one court as in the other. In such cases the courts of equity act in obedience to the statutes of limitation, from which they are no more exempt than the courts of law." Here all the rights claimed arose out of the bill of exchange and the relief asked concerned the damages occasioned by its non-payment. The case in 24 Howard, 284, was the case of a bill to enforce a lien secured by mortgage, in effect, so far as this question is concerned, precisely this case. It arose in the District Court of the United States for the District of Wisconsin. Under the statutes of that State it is provided that where there are concurrent remedies at law and in equity, the remedy in equity is barred in the same time that the remedy at law is barred. It is further provided that "bills for the relief in cases of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue and not after that time." The court held, upon bill filed for a foreclosure or sale of mortgaged property, that there was no corresponding remedy at law, and the bar of ten years was applied. There being no remedy at law corresponding to a suit in equity to sell the mortgaged land, the case of a bill in equity looking to that end does not present a case of concurrent jurisdiction, when viewed in reference to the action at law sounding in damages alone, and resulting in a general judgment. See 13 Wis., 274.

The Supreme Court of the United States, in the case of Hughes vs. Edwards, 9 Wheat., 498, speaking of the rule in a State where there was no express limitation barring the right to foreclose a mortgage, says: "In respect to the mortgagee who is seeking to foreclose the equity of redemption, the general rule is, that where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged by

payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption." This view is entirely inconsistent with the idea that a bill to sell mortgaged land presents a case of concurrent jurisdiction to an action at law upon the note, and it must be apparent that the case in 12 Peters, 56, has no application here. Cases of concurrent jurisdiction are found stated in Story's Eq. Pld'g, §751, and the distinction is well stated in 1 Story's Eq., §529, where it is said, in cases where the demand is strictly of a legal nature, or might be cognizable at law, courts of equity govern themselves by the same limitations as to entertaining such suits as are prescribed by the statute of limitations in courts of common law. But when the demand is not of a legal nature, but is purely equitable, or where the bar of the statute is inapplicable, courts of equity have another rule, founded sometimes upon the analogies of the law where such analogy exists, and sometimes upon its own inherent doctrine, not to entertain stale or antiquated demands. See also 2 Jones on Mortgages, 1192.

Our attention has been called to that class of decisions which limit the suit in equity by analogy to the limitation at law to actions for the recovery of real property. 8 Met., 87; 3 Mrld., 55; 3 John. Chy., 135; 19 Vmt., 526; 21 Ark., 385; 32 Miss., 226; 37 Miss., 585.

This plea, it will be observed, does not set up seven years, which is the limitation applicable to an action for the "recovery of real property" in this State. Whether, therefore, an action of ejectment or a legal right to possession exists in the mortgage, under the statute, at any time, is not herein necessarily involved; and the cases in which courts of equity limit the operation of the equitable remedy by analogy to the limitation to the legal remedy for "recovery of real property," are not strictly applicable to this plea.

It is to be remarked, however, that these cases, upon

strict, careful analysis of the principles involved, afford no authority for the view that the equitable remedy is limited by analogy to the limitation existing at law to an action *upon the contract naming the amount secured by the mortgage as contradistinguished from, and independent of, the contract embraced in the mortgage.* On the contrary, it must be admitted that the legal right to possession, the limitation to the remedy for the enforcement of which the court of equity adopts in such cases by analogy, arises out of, and independent of, the contract constituting the primary evidence of the debt in all cases where that contract is not embraced in the mortgage; and that it does not arise from the mortgage itself as contradistinguished from the note or bond which constitutes the primary evidence of the amount of the debt and the obligation of the parties.

Certainly the right of possession, resulting from a mortgage contract, does not come from the amount contracted to be paid by the promissory note which it is given to secure, or from the note.

These cases are, therefore, in principle authority for the proposition that the limitation for the equitable remedy of sale is not the limitation to the remedy for the recovery of the money contracted to be paid independent of the mortgage; for the limitation thus established by analogy is a limitation to the remedy for the recovery of the possession, the right to which enured under the mortgage, and not from the contract to pay the money.

Again, if the doctrine of these cases is correct, and this limitation to the remedy for the recovery of possession is the *only rule controlling,* then it follows in this State, where the mortgagee has no right to possession as to which a limitation to a remedy for the recovery of which can exist, that there is no limitation, and we are left, as a court of equity, to be controlled only by some other rule.

Again, these cases in principle are authorities against the

view that the equitable remedy to foreclose a mortgage is barred because it is an incident of the debt in the sense that when the debt is not recoverable at law payment in equity is not to be enforced, for they hold that the limitation arises from no such incidental relation, and involve a clear distinction between the debt and the remedy to enforce the debt outside of the mortgage, permitting the remedy at law upon the contract outside of the mortgage to be inoperative, because limited by lapse of time, and yet authorizing a remedy by foreclosure and sale under the mortgage.

Our attention has been called also to that class of cases "holding in specific terms that the statutory period for the recovery on the note having expired, there can be no foreclosure of the mortgage." 12 Texas, 427; 22 *Ib.*, 561; 18 Kan., 104; 18 Cal., 482; 2 Neb., 20.

The Supreme Court of Texas bases its conclusion to this effect upon the view that, in equity, the right of the mortgagor is superior to that of the mortgagee; that the mortgage is an incident of the debt; that the statute bars the debt; the abolition of the distinction between suits in equity and actions at law, and that it was never intended that the mortgagee should recover in ejectment. The principal ground upon which the conclusion is based is that the debt is gone when the remedy for its collection is barred. This is an error which that court has itself recognized in another case, (33 Tex., 745,) where it is properly held that "the limitation laws of the State of Texas affect the remedy only."

This is the doctrine announced by Lord Eldon and repeated by Chief Justice Marshall. In the case Spears vs. Hartly, 3 Esp., 81, Lord Eldon, speaking of the operation of the statute of limitations, says: "The debt was not discharged, it was the remedy only;" and Chief Justice Marshall, in the case of Sturges vs. Crowninshield, 4 Wheat.,

297, says: "Statutes of limitations relate to the remedies which are furnished in the courts." See also 9 How., 407.

The statute of limitations of California, while in some respects it is similar to the statute of this State, makes no distinction in the limitation to actions founded upon instruments of writing under seal, and the limitation to actions founded upon instruments of writing not under seal. This is also true of the statute of Nebraska, the limitation there is to actions upon "a specialty or any agreement, contract or promise in writing." In Kansas, the limitation is to an action upon a specialty or any agreement, contract or promise in writing, and the Supreme Court of that State, when attention was called to those English and American cases differing from the conclusions reached by it as to the operation of the statute of limitations, says that "in England and the States referred to a limitation different from that prescribed for simple contracts in writing was prescribed for specialties." 2 Kan., 390.

We find opposed to the conclusions reached in these cases in the Supreme Courts of Texas, Kansas and California, decisions in Maine, 65 Maine, 199, 26 Maine, 330; in Vermont, 25 Vmt., 324; in Massachusetts, 19 Pick., 535, 8 Met., 24, 4 Cush., 487, 8 Allen, 278; in Maryland, 4 Mar. Chy., 262, 1 Bland Chy., 282; in Michigan, 11 Mich., 265; in Connecticut, 11 Conn., 160; in Wisconsin, 20 Wis., 680; in Georgia, 8 Ga., 326; in Alabama, 1 Ala., 742; in Mississippi, 2 S. & M., 697, 37 Miss., 585, 32 Miss., 212; in Missouri, 61 Mo., 50; in Nevada, 1 Nev., 621, 2 *Ib.*, 265, 9 *Ib.*, 208; in Ohio, 11 Ohio State, 46; in New York, 7 Paige, 465, and in Oregon, 5 Oregon, 130.

The case of Dearman vs. Wyche, 9 Sim., 572, which has been called to our attention, presents the case of a plea of the statute of limitations under 3 and 4 Will. 4, chap. 27, sec. 40. The language of that statute is essentially different from the limitation prescribed in our statute, and I am

unable to see its application to the case at bar. The law before this statute (chapter 27) is stated in 2 Hare, 341, to have "enabled a creditor to enforce a lien where his debt as against the person is barred by the statute of limitations."

Entertaining these views, we think there was error in the action of the court, sustaining the plea of the statute in this case.

The decree is reversed and the case will be remanded for further proceedings.

RICHARD L. WILSON, ET AL., APPELLANTS, VS. JAMES D. MATHESON, APPELLEE.

1. Power was granted to the probate courts by Chapter 1358, Laws of 1862, to order the sale of real estate of decedents for the purpose of distribution.

2. When it is necessary for a party to establish a *prima facie* title to lands in order to maintain a suit to prevent or remove a cloud upon the title, and he shows that his grantor purchased at an administrator's sale in 1863, and, in connection with the administrator's deed, shows a decree of the probate court ordering the sale, upon petition for such sale for the purpose of distribution and payment of debts, a citation to persons interested in the estate will be presumed until the contrary is shown, especially when it appears that the heirs acquiesced in and ratified the sale at the time, and the purchaser and his grantee has had the undisturbed possession under such sale and deed for ten years.

3. Where a suit had been commenced against an administratrix, and judgment by default entered, and an assessment of damages made in 1863, but no judgment entered for ten years, and in the meantime the administratrix had sold the real estate, and afterwards, in 1873, the final judgment was entered in the original minutes of 1863, thus showing an apparent judgment lien as of 1863; *Held*, that the judgment so entered did not create a lien as against a *bona fide* purchaser, and an attempt to sell the land upon

execution under such judgment might be enjoined by such purchaser.

4. A judgment by default and assessment of damages entered, but no final judgment, does not create a lien against the lands of the defendant.

5. A judgment is not "goods or chattels," liable to levy and sale upon execution. Such a sale carries no right to control the judgment so sold, and is void.

Appeal from the Circuit Court for Alachua county.

The bill in this case was filed in 1874 by Matheson, appellee, against appellants.

The bill alleges that certain real estate of the estate of James C. Standley was sold under the decree of the probate court by Penelope L. Standley, the administratrix *de bonis non* of the estate of said James C. Standley. The order for the sale was obtained by the administratrix, October 26th, 1863, upon her petition "for the payment of the heirs and creditors of said estate," the petition alleging that the application for sale was made with the assent of the heirs and legatees, and the bill alleges that the heirs had consented thereto in writing. On December 7th, 1863, the lands were sold by the administratrix after due notice, and conveyed to Charles E. Haile or the consideration of $73,000 paid, and on the 29th September, 1866, Haile conveyed to Matheson in trust for certain purposes, and complainant and his grantor has been in the quiet enjoyment of the property ever since the conveyance by the administratrix, being upwards of ten years, as the owners of the same. That defendants Wilson and McHenry induced Barnes, sheriff, to levy an execution upon said lands, and to advertise them for sale in February, 1874, to satisfy a pretended judgment purporting to have been rendered in the Circuit Court for the sum of $8,405.21, damages in favor of Edward Remington against the administratrix of James C. Standley, deceased, on hte 13th October, 1863, the said Wilson and

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McHenry claiming to own the said judgment, but complainant says that said judgment, and the pretended ownership, and the right to control the same on the part of said defendants, are the results of chicane and fraud, and the attempted sale of said property will cast a cloud upon complainant's title and should be enjoined. The defendants Wilson and McHenry claim to own and control the judgment of Remington against the administratrix in the manner following: In 1867 and 1868, one Lew Williams obtained three several judgments against said Remington, of about $20 each and costs; James Bennett obtained judgment against Remington for $17.59 and costs, and Joseph Baldwin obtained two judgments against Remington for $84.40 and $96.56, besides costs. These six judgments were rendered by a justice's court in Alachua county. Executions were issued by the Clerk of the Circuit Court upon these justice's court judgments, and by virtue thereof the sheriff *levied upon* the $8,405.21 *judgment* of Remington vs. Standley's administratrix, and sold the same to Wilson and McHenry, or one of them, in June, 1873, the sheriff executing to them a bill of sale of said judgment, as appears in the exhibits on file. It is further alleged that at the time of such sale there was no judgment of record in Alachua county against Penelope L. Standley, administratrix of the estate of James C. Standley, deceased, but that there were in the records of the Circuit Court, under date of October 13, 1863, two separate entries, viz.: in a suit styled "Edward Remington vs. P. L. Standley adm'x," there is a memorandum that the defendant makes default, and damages are assessed at $8,405.21, but no final judgment was entered for any sum of damages or costs. The other entry is in a suit styled "Edward Remington vs. Penelope L. Standley, adm'x." and is a mere skeleton form of judgment against the defendant, but there is no assessment of damages or judgment for any sum.

The record thus stood until November 21, 1873, when a motion is entered by A. B. Hagan, as "plaintiff's counsel," that judgment be entered *nunc pro tunc* in the suit of "Edward Remington vs. Penelope L. Standley, adm'x," &c, which motion was granted, (as the clerk testifies, though the order granting the motion is not given in the record before the court,) and on the same day *the clerk filled up the blank in the first-mentioned entry in the original record,* thus making it appear that final judgment was entered October 13, 1863, and no judgment *nunc pro tunc* appears to have been entered on or after November 21, 1873, in pursuance of said motion. The declaration on file shows only $4,400 due at the time of the alleged assessment of damages instead of $8,405.21.

It is further alleged that said James C. Standley died in 1860, leaving over $40,000 of slave property, and over $14,000 of other personal property, besides a large amount of credits, and besides the real estate which was sold for $73,000; and that if this indebtedness had any real existence it could have been collected at the time, there being no other debts of consequence against the estate. But Remington took no steps toward collection of his claim after October 13, 1863. It is thereupon alleged that the said attempt of Wilson and McHenry is a fraudulent device to obtain money to which they are not entitled; that the said proceedings and pretended judgment against the administratrix, and the execution and threatened sale under it, tend to cast a cloud upon complainant's title and right of possession, and should be restrained by the writ of injunction from enforcing the judgment against said property of complainant.

Defendants Wilson and McHenry answer and insist that the judgment of Remington vs. Standley's administratrix was a valid judgment, and is a lien upon the lands of the decedent from the 13th October, 1863; that the sale of said

judgment by the sheriff, by virtue of the justice's judgments and execution, was valid, and gave them, as purchasers, a good title thereto, and they are *bona fide* owners and have lawful right to enforce the same against the lands claimed by complainant; and admit that they caused the sheriff to levy on them as alleged. They insist that complainant has no title by virtue of the sale by the administratrix under the order of the Probate Judge, as the Probate Court had no power to order the sale of lands to pay debts, the personal estate not having been exhausted; and that the sale to complainant's grantor was void. They deny all fraud and chicane and say that they are pursuing their honest rights.

As to the defendant, Remington, a decree *pro confesso* and final was entered against him (service having been made by publication,) on November 27, 1874, declaring the judgment entered in his name against Mrs. Standley, administratrix, void as to the rights of complainant, and enjoining the sale of the lands in question under it. Replication by complainant to the answer of Wilson and McHenry.

The testimony shows that defendants, Wilson and McHenry, bought the judgment of Remington vs. Standley at sheriff's sale under the justice's judgments upon executions issued by the clerk of the court, and that they procured the issuing of the execution against the estate of Standley, and directed the levy upon the land claimed by complainant as alleged. The order of the Probate Judge allowing the administratrix to sell the lands of the estate of James C. Standley was produced, dated October 26, 1863. The accompanying petition for such order asked that the sale be made for the purpose of paying the "heirs and creditors," and purported to be with the concurrence of the heirs.

The deed of the administratrix to Charles E. Haile, dated December 7, 1863, and the deed of Charles E. Haile to James D. Matheson in trust for Eliza W. Haile, dated 29th

September, 1866, were put in evidence. Also a paper signed and sealed by several persons as heirs of James C. Standley consenting to the sale and conveyance by the administratrix and ratifying the same, dated December 7, 1863.

There are also among the written evidence filed, the following papers relating to a suit or suits in favor of Edward Remington; a declaration filed January 8, 1862, against Samuel R. Pyles and Penelope L. Standley, administrators *de bonis non* of James C. Standley, deceased, on note dated April 4, 1859, for $6,171.75 with 8 per cent. interest, payable January 1, 1860, signed by Thomas A. Bradford, Henry Bradford and James C. Standley. A copy of the note is annexed to the declaration and is endorsed "paid 22 June, 1860, $2,863.69 and 26 November, 1861, $67.92. This declaration and the præcipe for summons are signed by J. B. Dawkins, attorney. Also a summons alias dated 12 July, 1872, against Penelope L. Standley, administratrix *de bonis non* of James C. Standley, endorsed, served 29 September, 1862, by the sheriff. Also præcipe for summons against Penelope Standley, executrix of the estate of James C. Standley, deceased, signed J. P. Sanderson, atorney, filed September 27, 1862, and summons of same date against Mrs. S., as executrix, &c., served October 1, 1862. Also declaration signed by Sanderson, attorney, against Penelope L. Standley, administratrix, &c., on note dated April 4, 1859, payable January 1, 1862, for $6,171.75, signed by the above named makers. A copy of this note is annexed to the declaration. There is also a paper marked "original note," and is a promissory note dated April 4, 1859, signed by the same makers as above, payable January 1, 1861, for $6,171.75 and eight per cent. interest.

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recital that the clerk had assessed the damages at $8,405.21, but the form of the final judgment was not filled up with the amount of judgment recovered, damages or costs. The other remained blank in respect to the assessment and final judgment.

The cause being submitted upon the bill, answer and proofs, on the 26th August, 1878, the chancellor decreed that the complainants were entitled to the relief prayed, and that defendants Wilson and McHenry, and all persons claiming through or under them, be enjoined from levying the execution under the blank judgment rendered 13th October, 1863, and filled up on November 21, 1873, upon the lands mentioned in the bill, and that said judgment so far as it affects the said lands, or any right, or interest of the complainant therein, was declared null and void, and that said defendants pay the costs.

From this decree the defendants appealed and pray that it be reversed.

Thrasher, Davis & Hampton, and *E. C. F. Sanchez* for Appellants.

Thomas F. King and *R. B. Hilton* for Appellees.

THE CHIEF JUSTICE delivered the opinion of the court—

The appellants insist, in the first instance, that the decree against Remington, (which was final, and not merely interlocutory,) should be reversed because there was no prayer for subpœna against him in the bill. He was served by publication, being a non-resident of the State, and the final decree against him was entered in 1874, nearly four years before this appeal was taken. The appeal was only from the decree of August 26, 1878. Appeals can only be taken within two years after final decree.

It is further urged that the decree was made without any

report of the master, and without notice to defendants. We notice, however, that the testimony to be used on the hearing, was taken under stipulation of parties before a person not appointed a master, and there was nothing referred to him or to a master upon which to report. As to notice of the time and place of hearing the chancellor certifies that due notice was given.

The right of complainant to file the bill in this case is denied by appellants, because he has established no title to the real estate described; that the judge of probate had no power to order the sale of the real estate for the payment of debts until the personal estate was exhausted, and therefore his order to the administratrix to sell land was void, as it did not appear that the personal estate had been exhausted.

To this it may be said that the application for the license, or order to sell the lands, was made upon the ground that it was desired by the heirs for the purposes of distribution and the payment of debts—"for the payment of the *heirs* and creditors," as expressed in the petition. The application to the judge and his order were doubtless made in view of "an act empowering Judges of Probate to grant orders to executors and administrators to sell real estate for distribution," approved December 10, 1862, Chapter 1358, Laws of 1862, which expressly granted jurisdiction to order a sale for distribution, and not under the provisions of the law of 1833, or 1841, found in Thompson's Digest, 202, 203, referred to by appellants' counsel. There is no doubt that the Probate Court, by the act of 1862, had jurisdiction of the subject-matter of the sale of real estate for distribution among the heirs. There is no pretense that the regularity of the proceedings and sale have been questioned by parties interested.

The judgments of Probate Courts, like the judgments of other courts of law, are final and conclusive in matters over

which they have jurisdiction. (Smith vs. Denson, Adm'r, 2 Sm. and Mar., 326, 339.) In that case the Court of Errors and Appeals, Sparkey, C. J., says: "The court, it seems, did make an order of sale. This it could not legally do without a citation. We must presume, in the absence of all showing to the contrary, that the court acted correctly. It is possible that the parties interested appeared without citation and thus dispensed with it." In the case at bar, the petition recites that the heirs join in the application, and they afterwards acquiesced in it.

It appears that a deed was executed by Mrs. Standley, administratrix, after due notice, and that other deeds and releases were at the same time executed by the reputed heirs, assenting to and ratifying the sale, and under these deeds the complainant and his grantors have been in the quiet possession for over ten years before the actual entry of the judgment. Complainant is not here defending himself from an attack by heirs or legatees who had no notice of the sale, or who were under disabilities; but, so far as this record shows, he has *prima facie* a sufficient legal title to enable him to maintain a suit of this character.

The suit is not, as assumed by counsel for appellees, brought to annul or to declare void a judgment, by a collateral proceeding, but it is to enjoin a sale of lands in which this complainant has a legal interest, under a judgment which, he says, is not in law or in equity a lien upon them superior to his interest.

It does not appear that Remington, in whose favor the judgment against the estate of Standley is claimed to exist, is an *actor* in the proceedings sought to be enjoined. At least two suits were commenced in his name against the estate in 1862: one, in which Dawkins appears as attorney for Remington, declaring against Pyles and Standley as administrators *de bonis non*, and one in which Sanderson is attorney, declaring against Mrs. Standley, as administratrix of

the estate of James C. Standley, deceased. There is a third summons (alias) which we are unable to connect with either of the above mentioned suits. Then we find that the note described in the declaration filed by Dawkins, attorney, is payable January 1, 1860; the note declared on in the Sanderson declaration is payable January 1, 1862; and the only original note among the papers on file in the Circuit Court is payable January 1, 1861. Each of these three notes bears the same date, is for the same amount, the same rate of interest, signed by the same makers, and all are identical except as to the time of payment. There were two skeleton forms of judgment, by default and final, entered under date of October 13, 1863, one following the other, in the first of which the assessment of damages was entered at $8,405.21, but no amount was entered in the final judgment. Upon which of these notes the assessment was made by the clerk, if either of them, does not appear. Neither of the originals of the two first mentioned notes is among the files, and the third (the original) is not described in eihter declaration, and is therefore probably not the one upon which the damages were assessed. Upon one of the notes set out in the Dawkins declaration apperas an indorsement of payments which reduce the amount due October 13, 1863, the date of the assessment of damages, to about $4,875,38. instead of $8,405.21 as entered by the clerk. If there were in fact three notes, it is singular that the original of the one upon which the clerk assessed the damages is not among the files. If there was but one note, then there has been gross carelessness in copying the record. The fact that there was no judgment attempted to be entered (at least two suits having been commenced at different periods,) leads to the suspicion that there was but one note, upon which two attorneys, at different times, brought suit. If this was the fact, it begets another suspicion, that the assessment of the amount due was *entered* in the records

unable to see its application to the case at bar. The law before this statute (chapter 27) is stated in 2 Hare, 341, to have "enabled a creditor to enforce a lien where his debt as against the person is barred by the statute of limitations."

Entertaining these views, we think there was error in the action of the court, sustaining the plea of the statute in this case.

The decree is reversed and the case will be remanded for further proceedings.

RICHARD L. WILSON, ET AL., APPELLANTS, VS. JAMES D. MATHESON, APPELLEE.

1. Power was granted to the probate courts by Chapter 1358, Laws of 1862, to order the sale of real estate of decedents for the purpose of distribution.

2. When it is necessary for a party to establish a *prima facie* title to lands in order to maintain a suit to prevent or remove a cloud upon the title, and he shows that his grantor purchased at an administrator's sale in 1863, and, in connection with the administrator's deed, shows a decree of the probate court ordering the sale, upon petition for such sale for the purpose of distribution and payment of debts, a citation to persons interested in the estate will be presumed until the contrary is shown, especially when it appears that the heirs acquiesced in and ratified the sale at the time, and the purchaser and his grantee has had the undisturbed possession under such sale and deed for ten years.

3. Where a suit had been commenced against an administratrix, and judgment by default entered, and an assessment of damages made in 1863, but no judgment entered for ten years, and in the meantime the administratrix had sold the real estate, and afterwards, in 1873, the final judgment was entered in the original minutes of 1863, thus showing an apparent judgment lien as of 1863; *Held*, that the judgment so entered did not create a lien as against a *bona fide* purchaser, and an attempt to sell the land upon

execution under such judgment might be enjoined by such purchaser.

4. A judgment by default and assessment of damages entered, but no final judgment, does not create a lien against the lands of the defendant.

5. A judgment is not "goods or chattels," liable to levy and sale upon execution. Such a sale carries no right to control the judgment so sold, and is void.

Appeal from the Circuit Court for Alachua county.

The bill in this case was filed in 1874 by Matheson, appellee, against appellants.

The bill alleges that certain real estate of the estate of James C. Standley was sold under the decree of the probate court by Penelope L. Standley, the administratrix *de bonis non* of the estate of said James C. Standley. The order for the sale was obtained by the administratrix, October 26th, 1863, upon her petition "for the payment of the heirs and creditors of said estate," the petition alleging that the application for sale was made with the assent of the heirs and legatees, and the bill alleges that the heirs had consented thereto in writing. On December 7th, 1863, the lands were sold by the administratrix after due notice, and conveyed to Charles E. Haile or the consideration of $73,000 paid, and on the 29th September, 1866, Haile conveyed to Matheson in trust for certain purposes, and complainant and his grantor has been in the quiet enjoyment of the property ever since the conveyance by the administratrix, being upwards of ten years, as the owners of the same. That defendants Wilson and McHenry induced Barnes, sheriff, to levy an execution upon said lands, and to advertise them for sale in February, 1874, to satisfy a pretended judgment purporting to have been rendered in the Circuit Court for the sum of $8,405.21, damages in favor of Edward Remington against the administratrix of James C. Standley, deceased, on hte 13th October, 1863, the said Wilson and

McHenry claiming to own the said judgment, but complainant says that said judgment, and the pretended ownership, and the right to control the same on the part of said defendants, are the results of chicane and fraud, and the attempted sale of said property will cast a cloud upon complainant's title and should be enjoined. The defendants Wilson and McHenry claim to own and control the judgment of Remington against the administratrix in the manner following: In 1867 and 1868, one Lew Williams obtained three several judgments against said Remington, of about $20 each and costs; James Bennett obtained judgment against Remington for $17.59 and costs, and Joseph Baldwin obtained two judgments against Remington for $84.40 and $96.56, besides costs. These six judgments were rendered by a justice's court in Alachua county. Executions were issued by the Clerk of the Circuit Court upon these justice's court judgments, and by virtue thereof the sheriff *levied upon* the $8,405.21 *judgment* of Remington v. Standley's administratrix, and sold the same to Wilson and McHenry, or one of them, in June, 1873, the sheriff executing to them a bill of sale of said judgment, as appears in the exhibits on file. It is further alleged that at the time of such sale there was no judgment of record in Alachua county against Penelope L. Standley, administratrix of the estate of James C. Standley, deceased, but that there were in the records of the Circuit Court, under date of October 13, 1863, two separate entries, viz.: in a suit styled "Edward Remington vs. P. L. Standley adm'x," there is a memorandum that the defendant makes default, and damages are assessed at $8,405.21, but no final judgment was entered for any sum of damages or costs. The other entry is in a suit styled "Edward Remington vs. Penelope L. Standley, adm'x." and is a mere skeleton form of judgment against the defendant, but there is no assessment of damages or judgment for any sum.

The record thus stood until November 21, 1873, when a motion is entered by A. B. Hagan, as "plaintiff's counsel," that judgment be entered *nunc pro tunc* in the suit of "Edward Remington vs. Penelope L. Standley, adm'x," &c, which motion was granted, (as the clerk testifies, though the order granting the motion is not given in the record before the court,) and on the same day *the clerk filled up the blank in the first-mentioned entry in the original record,* thus making it appear that final judgment was entered October 13, 1863, and no judgment *nunc pro tunc* appears to have been entered on or after November 21, 1873, in pursuance of said motion. The declaration on file shows only $4,400 due at the time of the alleged assessment of damages instead of $8,405.21.

It is further alleged that said James C. Standley died in 1860, leaving over $40,000 of slave property, and over $14,000 of other personal property, besides a large amount of credits, and besides the real estate which was sold for $73,000; and that if this indebtedness had any real existence it could have been collected at the time, there being no other debts of consequence against the estate. But Remington took no steps toward collection of his claim after October 13, 1863. It is thereupon alleged that the said attempt of Wilson and McHenry is a fraudulent device to obtain money to which they are not entitled; that the said proceedings and pretended judgment against the administratrix, and the execution and threatened sale under it, tend to cast a cloud upon complainant's title and right of possession, and should be restrained by the writ of injunction from enforcing the judgment against said property of complainant.

Defendants Wilson and McHenry answer and insist that the judgment of Remington vs. Standley's administratrix was a valid judgment, and is a lien upon the lands of the decedent from the 13th October, 1863; that the sale of said

judgment by the sheriff, by virtue of the justice's judgments and execution, was valid, and gave them, as purchasers, a good title thereto, and they are *bona fide* owners and have lawful right to enforce the same against the lands claimed by complainant; and admit that they caused the sheriff to levy on them as alleged. They insist that complainant has no title by virtue of the sale by the administratrix under the order of the Probate Judge, as the Probate Court had no power to order the sale of lands to pay debts, the personal estate not having been exhausted; and that the sale to complainant's grantor was void. They deny all fraud and chicane and say that they are pursuing their honest rights.

As to the defendant, Remington, a decree *pro confesso* and final was entered against him (service having been made by publication,) on November 27, 1874, declaring the judgment entered in his name against Mrs. Standley, administratrix, void as to the rights of complainant, and enjoining the sale of the lands in question under it. Replication by complainant to the answer of Wilson and McHenry.

The testimony shows that defendants, Wilson and McHenry, bought the judgment of Remington vs. Standley at sheriff's sale under the justice's judgments upon executions issued by the clerk of the court, and that they procured the issuing of the execution against the estate of Standley, and directed the levy upon the land claimed by complainant as alleged. The order of the Probate Judge allowing the administratrix to sell the lands of the estate of James C. Standley was produced, dated October 26, 1863. The accompanying petition for such order asked that the sale be made for the purpose of paying the "heirs and creditors and purported to be with the concurrence of the heirs.

The deed of the administratrix to Charles E. Haile, dated December 7, 1863, and the deed of Charles E. Haile to James D. Matheson in trust for Eliza W. Haile, dated

September, 1866, were put in evidence. Also a paper signed and sealed by several persons as heirs of James C. Standley consenting to the sale and conveyance by the administratrix and ratifying the same, dated December 7, 1863.

There are also among the written evidence filed, the following papers relating to a suit or suits in favor of Edward Remington; a declaration filed January 8, 1862, against Samuel R. Pyles and Penelope L. Standley, administrators *de bonis non* of James C. Standley, deceased, on note dated April 4, 1859, for $6,171.75 with 8 per cent. interest, payable January 1, 1860, signed by Thomas A. Bradford, Henry Bradford and James C. Standley. A copy of the note is annexed to the declaration and is endorsed "paid 22 June, 1860, $2,863.69 and 26 November, 1861, $67.92. This declaration and the præcipe for summons are signed by J. B. Dawkins, attorney. Also a summons alias dated 12 July, 1872, against Penelope L. Standley, administratrix *de bonis non* of James C. Standley, endorsed, served 29 September, 1862, by the sheriff. Also præcipe for summons against Penelope Standley, executrix of the estate of James C. Standley, deceased, signed J. P. Sanderson, atorney, filed September 27, 1862, and summons of same date against Mrs. S., as executrix, &c., served October 1, 1862. Also declaration signed by Sanderson, attorney, against Penelope L. Standley, administratrix, &c., on note dated April 4, 1859, payable January 1, 1862, for $6,171.75, signed by the above named makers. A copy of this note is annexed to the declaration. There is also a paper marked "original note," and is a promissory note dated April 4, 1859, signed by the same makers as above, payable January 1, 1861, for $6,171.75 and eight per cent. interest.

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The cause being submitted upon the bill, answer and proofs, on the 26th August, 1878, the chancellor decreed that the complainants were entitled to the relief prayed, and that defendants Wilson and McHenry, and all persons claiming through or under them, be enjoined from levying the execution under the blank judgment rendered 13th October, 1863, and filled up on November 21, 1873, upon the lands mentioned in the bill, and that said judgment so far as it affects the said lands, or any right, or interest of the complainant therein, was declared null and void, and that said defendants pay the costs.

From this decree the defendants appealed and pray that it be reversed.

Thrasher, Davis & Hampton, and *E. C. F. Sanchez* for Appellants.

Thomas F. King and *R. B. Hilton* for Appellees.

JUSTICE delivered the opinion of the court—

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report of the master, and without notice to defendants. We notice, however, that the testimony to be used on the hearing, was taken under stipulation of parties before a person not appointed a master, and there was nothing referred to him or to a master upon which to report. As to notice of the time and place of hearing the chancellor certifies that due notice was given.

The right of complainant to file the bill in this case is denied by appellants, because he has established no title to the real estate described; that the judge of probate had no power to order the sale of the real estate for the payment of debts until the personal estate was exhausted, and therefore his order to the administratrix to sell land was void, as it did not appear that the personal estate had been exhausted.

To this it may be said that the application for the license, or order to sell the lands, was made upon the ground that it was desired by the heirs for the purposes of distribution and the payment of debts—"for the payment of the *heirs* and creditors," as expressed in the petition. The application to the judge and his order were doubtless made in view of "an act empowering Judges of Probate to grant orders to executors and administrators to sell real estate for distribution," approved December 10, 1862, Chapter 1358, Laws of 1862, which expressly granted jurisdiction to order a sale for distribution, and not under the provisions of the law of 1833, or 1841, found in Thompson's Digest, 202, 203, referred to by appellants' counsel. There is no doubt that the Probate Court, by the act of 1862, had jurisdiction of the subject-matter of the sale of real estate for distribution among the heirs. There is no pretense that the regularity of the proceedings and sale have been questioned by parties interested.

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It appears that a deed was executed by Mrs. Standley, administratrix, after due notice, and that other deeds and releases were at the same time executed by the reputed heirs, assenting to and ratifying the sale, and under these deeds the complainant and his grantors have been in the quiet possession for over ten years before the actual entry of the judgment. Complainant is not here defending himself from an attack by heirs or legatees who had no notice of the sale, or who were under disabilities; but, so far as this record shows, he has *prima facie* a sufficient legal title to enable him to maintain a suit of this character.

The suit is not, as assumed by counsel for appellees, brought to annul or to declare void a judgment, by a collateral proceeding, but it is to enjoin a sale of lands in which this complainant has a legal interest, under a judgment which, he says, is not in law or in equity a lien upon them superior to his interest.

It does not appear that Remington, in whose favor the judgment against the estate of Standley is claimed to exist, is an *actor* in the proceedings sought to be enjoined. At least two suits were commenced in his name against the estate in 1862: one, in which Dawkins appears as attorney for Remington, declaring against Pyles and Standley as administrators *de bonis non*, and one in which Sanderson is attorney, declaring against Mrs. Standley, as administratrix of

the estate of James C. Standley, deceased. There is a third summons (alias) which we are unable to connect with either of the above mentioned suits. Then we find that the note described in the declaration filed by Dawkins, attorney, is payable January 1, 1860; the note declared on in the Sanderson declaration is payable January 1, 1862; and the only original note among the papers on file in the Circuit Court is payable January 1, 1861. Each of these three notes bears the same date, is for the same amount, the same rate of interest, signed by the same makers, and all are identical except as to the time of payment. There were two skeleton forms of judgment, by default and final, entered under date of October 13, 1863, one following the other, in the first of which the assessment of damages was entered at $8,405.21, but no amount was entered in the final judgment. Upon which of these notes the assessment was made by the clerk, if either of them, does not appear. Neither of the originals of the two first mentioned notes is among the files, and the third (the original) is not described in eihter declaration, and is therefore probably not the one upon which the damages were assessed. Upon one of the notes set out in the Dawkins declaration apperas an indorsement of payments which reduce the amount due October 13, 1863, the date of the assessment of damages, to about $4,875,38. instead of $8,405.21 as entered by the clerk. If there were in fact three notes, it is singular that the original of the one upon which the clerk assessed the damages is not among the files. If there was but one note, then there has been gross carelessness in copying the record. The fact that there was no judgment attempted to be entered (at least two suits having been commenced at different periods,) leads to the suspicion that there was but one note, upon which two attorneys, at different times, brought suit. If this was the fact, it begets another suspicion, that the assessment of the amount due was *entered* in the records

in 1873 instead of 1863, because the amount due computed in 1873, (deducting the payments) was about the amount entered as *assessed* to be due in 1863, and the entry of the amount of $8,405.21, due as of 1863, was a gross fraud or a serious mistake.

These suggestions are offered for the consideration of the counsel of both parties.

The proof shows that there was no final judgment entered in October, 1863. In November, 1873, the attorney Hagan first appears and enters a motion in behalf of the plaintiff, that "judgment *nunc pro tunc* be entered upon the assessment of damages made in the cause at the fall term, A. D., 1863, to-wit: the thirteenth day of October, A. D., 1863, upon which assessment of damages the clerk omitted to enter up judgment." The clerk testifies that instead of entering the judgment *nunc pro tunc* under this motion, he, under the order of the court on that motion, *filled up the blanks* in the records of the court held in October, 1863, thus making it appear upon the face of that record that the final judgment had in fact been entered in 1863, ten years before the motion was made, while it is not shown that the court in 1863 had ordered judgment to be entered.

It is apparent by this testimony, that at the time of the purchase of lands at the sale made by the administratrix in December, 1863, this judgment was not, and was not in a proper condition to be docketed, as a lien upon the lands, and that the final judgment had not been entered or docketed until the purchaser and his grantee (complainant,) had "quietly possessed" the lands for the period of ten years under the administrator's sale.

No explanation is given of the reason why the judgment was not perfected at an earlier period, upon one or upon the three notes of large amount. Remington does nothing. The lands brought a large amount of money to the estate,

the personal estate was worth, as appears by the proofs, about forty thousand dollars, there were other moneys due in the form of credits, and but little indebtedness, yet the Remington claim is permitted to sleep, after suit brought and without final judgment, and no effort is made to collect it from the estate, until, after ten years of slumber, in August, 1873, the defendants, Wilson and McHenry, attempt to "bid in" this claim of over eight thousand dollars for the sum of ten dollars, upon a sale made under executions from a justice's court. Under this supposed purchase Wilson and McHenry have since assumed control of this large claim, have had a final judgment entered by an interpolation and alteration of the old records of the court, procured an execution to be issued after the records were so changed, and caused a levy to be made upon these lands.

We have not endeavored, or intended to pronounce the judgment void, as to Mrs. Standley. She is not a party to this suit. It will be a proper time to determine that question when she lays a foundation for it. Nor does the bill pray that the judgment be declared void, but only that it is void as to the rights of the complainant.

We have seen that until November 21, 1873, the record did not show that any final judgment was entered or docketed, so as to become a lien upon this land. (24 Maryland Rep., 538.) And we observe, further, that the court did *not* in 1873, upon the motion of Mr. Hagan, counsel for Remington, enter a judgment *nunc pro tunc*. No order to that effect appears, but the clerk testifies that, upon *some order*, he filled up the original skeleton form of the final judgment by inserting in it a sum of money. While it is common practice of the courts to order judgment to be entered *nunc pro tunc*, in furtherance of justice, such judgments will not affect third persons who have acquired

rights. See Freeman on Judgments, sections 66, 68, 340, and authorities cited.

It is insisted by complainant that the final judgment, as it now stands, is not a judgment against the administratrix of J. C. Standley, deceased, as it appears only to be a judgment against "the defendant," and who "the defendant" is, is only to be found in the entitling of the judgment, viz: "P. L. Standley, administratrix, &c." and it does not appear therein of whose estate she was the "administratrix." In view of our conclusion upon the other aspects of the case, it is not necessary to declare here the status of Mrs. Standley as to that entry.

Much of the foregoing discussion may not be absolutely necessary to determine the rights of the defendants, Wilson and McHenry. They claim rights as purchasers of the Remington judgment, under executions from justice's courts against Remington, by virtue of a levy under the latter upon the former. But first, we find that there was no final judgment at the time of the levy and sale to them; and second, a judgment is not the subject of levy and sale, under execution from a court of law. By the statute, only "lands and tenements, goods and chattels," are liable to be taken in execution and sold. Thomp. Dig., 355.

Choses in action, as bills, bonds, notes, judgments, and the like, are not the subject of levy and sale under execution. I Cowen, N. Y., 240; 2 Blackf., Ind., 361; 23 Tex., 508; 4 Minn., 407; 23 Iowa, 104.

These defendants, therefore, acquired no title to the judgment, nor would they have had title if the judgment had been perfected at the time of the supposed levy and sale. All the proceedings had, and taken by them, or by their procurement under such supposed title, are of no avail, are unauthorized and void. They pretend to have no other

right except under such sale, and they have no defensible standing before the court.

The decree of the Circuit Court must be affirmed.

ROBERT BURROUGHS, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. An initial letter, interposed between the christian and surname, is no part of the name. The law knows only of one christian name.
2. An indictment was presented by a grand jury against Robert H. Burroughs. The defendant plead in abatement that his name was Robert Burroughs. The court permitted the State's attorney to specify in writing the fact that the indictment was found against Robert Burroughs, under the name of Robert H. Burroughs, such specification in writing being under chapter 1107 of the laws of 1861; *Held*, That the court had authority so to order, under and by virtue of that act.
3. Courts are entrusted with a discretion in regard to the order of the introduction of evidence and the examination of witnesses, and this discretion should be exercised in furtherance of justice.
4. It is not error when, in the exercise of a sound discretion, the court permits the party to introduce a new witness after the evidence is closed on both sides, unless such witness has been kept back by trick, or the opposite party had been deceived or injuriously affected by it.
5. A general exception to the charge of the judge to the jury is not available on error, if any one of the propositions contained in such charge is correct.
6. During the trial, the counsel for the defendant reduced to writing, and gave to the judge a proposition he desired him to embody in his charge to the jury. Subsequently in charging the jury, the judge neglected to give such proposition, or the substance thereof, to the jury. Defendant's counsel did not call the attention of the judge to such request, and failed to note an exception; *Held*, That defendant's counsel abandoned his request, and that there was no error.

n objection to the manner of drawing, summoning, or empanelling a grand jury, must be taken advantage of by plea in abatement to the indictment, and cannot be made the ground of a motion in arrest of judgment.

Judges of the Circuit Courts of this State may charge juries trying felonies not punishable capitally, and misdemeanors, orally; unless before the evidence in the case is closed, the State's attorney, or the attorney or attorneys, for the defendant or plaintiff, or the parties themselves, shall, in writing, request such Judge to charge the jury in writing. (Chapter 2096, Laws 1877.)

Writ of Error to the Circuit Court for Madison county.

On the 21st day of April, 1879, the grand jury of Madison county presented an indictment against Robert H. Burroughs, for an "assault with intent to murder." The material part of said indictment charges "that Robert H. Burroughs, late of said county of Madison, on the 20th day of March, in the year of our Lord one thousand eight hundred and seventy-nine, and on divers other days and times between that day and the day of the finding of this inquisition, with force and arms within the county and State aforesaid, unlawfully, with a gun known as a musket gun, which he the said Robert H. Burroughs in his hand then and there held, loaded with gun-powder and leaden bullets, in and upon one M. H. Wearing, did make an assault, and placing said musket gun to his shoulder, the muzzle of said musket gun, loaded as aforesaid, pointing toward the said M. H. Wearing, with an intent him, the said M. H. Wearing, then and there feloniously, willfully, and of his malice aforethought to murder and other wrongs to the said M. H. Wearing, then and there did, contrary to the form of the statute," &c.

To this indictment the defendant filed a plea in abatement, alleging that he had never been known or called by the name of Robert H. Burroughs, but that his name was Robert Burroughs, and prayed the court to quash the indictment.

The court overruled the plea, and permitted the State's attorney to file his specification amending the indictment, to which decision the defendant's counsel duly excepted. The specification so filed is as follows:

State vs. Robert Burroughs. } Circuit Court of Madison county—Indictment for Assault with intent to Murder.

The defendant having filed a plea in abatement in the above cause, setting forth that his true name is Robert Burroughs, and not Robert H. Burroughs, as set forth in the indictment, and it appearing that the indictment is vague and indefinite in said particular, and may expose the accused to substantial danger of a new indictment for the same offence, and the court so ordering, now comes the State of Florida, by William B. Taylor, State's attorney, and avoids the objection set forth by the said plea in abatement, and specifies that he is prosecuting the said Robert Burroughs, the person who makes the said plea, and not Robert H. Burroughs, and he specifies that the said indictment is intended to be against the said Robert Burroughs, and files this specification to be deemed and taken to be a part of said indictment.

WM. B. TAYLOR, *State's Attorney.*

On the filing of this specification, on motion of the defendant, the cause was continued until the next term of the court.

On the 22nd day of October, 1879, the counsel for the defendant moved to quash the indictment for the reason that it "was vague and indefinite" and did not "sufficiently describe the manner in which the alleged assault was made."

The court overruled the motion and the defendant's counsel excepted. The defendant then plead not guilty, the cause was tried, the court charged the jury, and the "defendant, by his attorney, did then and there except to the whole of

said charge." The bill of exceptions recites that the "defendant, by his attorney, during the progress of said trial, and while said judge was preparing his charge to the jury, reduced the following to writing, and requested the judge to give the same specially in charge to the jury, to-wit: 'If you believe from the evidence that at the time of the alleged assault the defendant was walking along the streets of Madison, and was suddenly warned or informed by any one that Wearing, or any one else, was in the act of shooting him, he was justified in putting himself in an attitude of defense.' After the judge had concluded his charge to the jury, and not hearing any further request from counsel to give anything specially in charge, he, the said judge, neglected to give the above, or the substance thereof, in charge to the jury as requested."

The jury found the defendant guilty and recommended him to the mercy of the court.

The counsel then moved for new trial and also in arrest of judgment.

The court overruled both motions, and the defendant's counsel duly excepted.

The court then sentenced the defendant to the penitentiary for the term of five years.

From this judgment the defendant brings his writ of error, and assigns the following errors:

I. The court erred in overruling the defendant's plea in abatement, and in permitting the State's attorney to file specification amending said indictment.

II. The court erred in overruling defendant's motion to quash the indictment.

III. The court erred in permitting the State's attorney to peremptorily challenge the juror, W. R. Cone, who had been accepted by the State and tendered to the defendant and virtually accepted by him.

IV. The court erred in permitting the witness, Z.

Cobb, to testify as to the declarations of the defendant prior to the alleged assault after the defense had rested, such testimony not being in rebuttal of any matter introduced by the defendant.

V. The court erred in charging the jury; the punishment for assault with intent to murder was imprisonment in the State penitentiary "not exceeding two years or by fine not exceeding $500."

VI. The court charged the jury as follows: "If you believe from the evidence that the accused, at the time he is alleged to have made the assault, said to Wearing, 'if you present that pistol,' or 'if you do not let me alone,' or with any such condition or qualification made at the time, and Wearing thereupon desisted, and nothing more was done by the accused, there was no legal assault;" such charge was error, in that it was a mere abstract principle of law, not applicable to the case.

VII. The court erred in refusing or neglecting to give to the jury the charge requested by defendant's counsel.

VIII. The court erred in overruling defendant's motion for new trial upon the grounds therein alleged.

IX. The court erred in overruling defendant's motion in arrest of judgment upon the grounds therein alleged.

X. The court erred in not signing and sealing his instructions to the jury.

J. N. Stripling and *H. Bisbee, Jr.,* for Plaintiff in Error.

1. Plaintiff in error pleaded misnomer in abatement. Misnomer is ground for abatement. 1 Arch. Criminal Pleading and Practice, 6 ed., 111, note 1.

The court permitted the State Attorney to file specification amending the indictment. This was error; such specification formed no part of said indictment, and no person can be tried, except upon indictmnet. Bill of Rights, sec. 8.

Amendments not permissible. 1 Bish. Crim. Pro., §88, 96, 97, 70, 7, 8, 9, 10; 1 Arch. Crim. Plead. and Prac., 6 Ed., 100; McKinly vs. State, 8 Hump., 22; 35 Miss., 366; 3 Cush., 282; 10 Mass., 28; 16 Pick., 120.

3. The indictment should have been quashed. An assault must consist of certain acts, and the acts constituting it must be specially and definitely alleged. Beasley vs. State, 18 Ala., 535; Trexler vs. State, 19 Ala., 21; State vs. Johnson, 11 Texas, 22.

4. The court erred in permitting the witness Cobb to testify as to the declarations of the defendant before the alleged assault, after the testimony had closed for State and prisoner, such testimony not being in rebuttal of anything offered by defense. It is true that the court has large discretion in the admission of testimony, and upon good reason shown, may depart from the rule, but such departure should only be made where the State attorney closes his case inadvertently. (Haskins vs. State, 11 Ga., 92.) In this case the State attorney closed after due deliberation, without Cobb's evidence. The emergency, therefore, did not arise which called upon the court to exercise its discretion in departing from an established rule.

5. The court erred in charging the jury, that the punishment for assault with intent to murder was imprisonment, &c., or fine of $500. No exception was taken at the time to this charge of the court; but if the law is incorrectly stated, the opinion of the judge ought to be revised. Hartston vs. Russell, 1 Cranch, 309, 318.

6. It was error in the court to charge the jury, the abstract principle of law, that if they believed from the evidence the prisoner made use of any qualifying remarks such as "if you don't let me alone, I'll shoot you," no legal assault was made. Neither side attempted to show any such state of facts, and the charge was calculated to mislead the jury. If such charge could have misled

jury, verdict ought to be set aside. Hamilton vs. Russell, 1 Cranch, 307, 318. It is no part of the law of the case. Chapter 2096, laws 77.

7. It was error in the court to refuse or neglect to give the charge requested by defendant's counsel. It was an omission to charge an important and material question of law, applicable to the case, and this verdict ought to be set aside. Galbrith vs. Gracy, 1 Wash., c. c. 198.

8. The court should have granted a new trial because the verdict was not warranted by the evidence.

9. The judgment should have been arrested. The grand jury which presented the indictment was illegal in that it was drawn from a list which contained more than 300 names. Gladden vs. State, 13 Fla., 623; State vs. Harden, 2 Rich., 533; Miller vs. State, 33 Miss., 356; Bishop Crim. Pro., §88, 89, page 540.

10. Lastly, judge did not sign and seal instructions to jury. Chapter 2096, act 77.

The Attorney-General for the Defendant in Error.

1. The first assignment of error is that the court erred in overruling defendant's plea in abatement, and permitting the State Attorney to file specifications amending the indictment.

This assignment should be discussed first with reference to overruling the plea, and then as to permitting the filing of the specifications.

The plea is one of misnomer, to-wit: that his name is Robert Burroughs, and not "Robert H. Burroughs," as alleged in the indictment.

The law knows only of one christian name, and the middle name forms no part of it, so that its insertion or omission makes no difference, and may be disregarded. Edmondson vs. State, 17 Ala., 179; State vs. Manning, 14

Texas, 402; State vs. Smith, 7 English, 622; Kean vs. Meade, 3 Peters, 9; Franklin et al vs. Talmage, 5 Johns., 84; Erskine vs. Davis, 25 Ill., 251; State vs. Martin, 10 Mo., 391; State vs. Williams, 20 Iowa, 98; State vs. Thompson, 19 Iowa, 298.

Mr. Bishop, in his "Criminal Procedure," Vol. 1, §683, intimates the opinion that at the present time in this country the above is not sound doctrine. We respectfully submit, however, that such is the current of *modern* authority and the old law.

The specification filed by the State attorney does not impair the indictment. The middle name or initial being no name, and the court having in effect so decided, there was no necessity for such a paper being filed, and, relating as it does, to an immaterial defect, it has no effect in law one way or the other. If of any effect, it is beneficial to the prisoner in identifying him and saving him against a second jeopardy.

It is to be presumed, I suppose, that this proceeding was taken under Chapter 1107, of the Laws of Florida. The following authorities affirm the constitutionality of the amendment and of such statute: 1 Bishop on Crim. Pro., §97, 98, 711; State vs. Schrucker, 29 Mo., 268; State vs. Manning, 14 Texas, 402; Commonwealth vs. Holly, 3 Gray, 458; Rocco vs. State, 37 Miss., 357.

2. The second assignment of error is that the court erred in overruling the motion to quash the indictment. The ground of this motion is that the indictment is vague and indefinite, and does not sufficiently describe the manner in which the assault was made. It is respectfully submitted that an inspection of the paper will disclose the contrary.

3. The third assignment of error is that the court erred in permitting the State Attorney to challenge peremptorily the juror, W. R. Cone. The circumstances were as follows: The regular venire having been exhausted, the court in-

structed the sheriff to summon by-standers, and of the by-standers so summoned, Cone and two others were tendered by the State to the defendant, all of whom, except Cone, were peremptorily challenged by the defendant. Two othr by-standers were then summoned, and the State Attorney then moved the court for leave to withdraw the tender of Cone, and to peremptorily challenge him, and the motion was allowed.

There was no error in this. This right exists up to the swearing of the puror. Such matters rest in the sound discretion of the court, and will not be controlled by the appellate court, unless it is shown that injury has been done the prisoner. It is not so shown in this case. O'Conner vs. State, 9 Fla., 216, 226, 230; Beauchamp vs. State, 6 Blackford, 307; Munly vs. State, 7 Blackford, 593; Morris vs. State, 7 Blackford, 607; State vs. Hays, 23 Mo., 287; People vs. Kohle, 4 Cal., 198; People vs. Rodiguez, 10 Cal., 50; Henrick vs. Commonwealth, 5 Leigh, 708; People vs. Bodine, 1 Denio, 281; 1 Bp. Cr. Pro., §945, 933; 1 Chitty's C. Law, 545; 12 Wheaton, 480.

4. The fourth assignment is upon the court's permitting a witness to testify as to the declarations of the defendant prior to the alleged assault after the defense had rested, such testimony not being in rebuttal of any evidence introduced by the defendant.

Assuming even that the testimony is not in rebuttal of any evidence introduced by the defendant, the matter was still one within the sound discretion of the court below, and an appellate court will not control such discretion, unless it is apparent that injustice has been done. This is not shown. Coker and Scheiffer vs. Hays, 16 Fla., 377; Braydon vs. Goulman, 1 Monroe, 115-17-18; 2 Philips on Ev., Mather, 4 Wend., 249; Law vs. Merrills, 5 Wend., 268.

5 and 6. The fifth and sixth assignments of error are to

the charge of the court to the jury. It is sufficient to say no proper exceptions have been made to the charge. The charge embraces distinct propositions, and if any of these are erroneous they are not all so, and the exception is general. Dupuis vs. Thompson, 16 Fla., 69; May and Sloan vs. Gamble, 14 Fla., 467.

7. The seventh assignment of error is as to the court's refusal to give a charge requested. It is sufficient to say that there is no exception to the refusal of the court, if there was such refusal. (Story and Sullivan vs. State, 16 Fla.) There was no such refusal; the defendant virtually abandoned his application.

8. The eighth assignment of error is that the court erred in refusing defendant a new trial, upon the grounds alleged in his motion. The third, fourth and fifth grounds of the motion for a new trial are those assigned for error in the third, fourth and seventh assignments of error. The first ground of the motion is, that the verdict was contrary to law; and the second, that it is contrary to evidence. We respectfully contend that there is nothing to sustain these grounds. The verdict was legal and in accordance with the testimony, assuming always that the jury are the judges of the credibility of the witnesses. There is, it is true, conflicting testimony, but it was for the jury to say whom they would believe. It is unnecessary to cite authority as to this being a jury's province. The testimony not being voluminous, it is not necessary to insert it here, or discuss it other than orally.

9. The ninth assignment of error is that the court erred in overruling the defendant's motion in arrest of judgment.

There are five grounds for arresting the judgment stated.

The first is that the list of names was not properly certified and signed by the Chairman of the Board of County Commissioners, and the second is that this list contained more than three hundred names.

There is nothing in the bill of exceptions to show these allegations to be true. The papers following the bill of exceptions cannot be considered as part of the testimony in this case, or as having been introduced in evidence in the court below to sustain these allegations, as they are not incorporated in the bill of exceptions. Robinson vs. L'Engle, 13 Fla., 482; Proctor vs. Hart, 5 Fla., 469; Tompkins vs. Eason, 8 Fla., 14; Robinson vs. Mathews, 16 Fla., 319.

Exceptions of this character to the grand jury should be taken by plea in abatement or challenge, and cannot, after a plea of not guilty and trial, be availed of by a motion in arrest of judgment. Kitrol vs. State, 9 Fla., 9; Gladden vs. State, 13 Fla., 630; McQuillen vs. State, 8 S. & M., 587; People vs. Griffin, 2 Barb., 427.

The third ground of the motion is that it does not appear by the record that there was any notice given of the time and place when the jurors were to be drawn who were to serve at the term of the court at which the indictment wsa found and presented.

I do not feel that it is necessary to produce authority to the effect that the presumption is that these notices were given. To overcome this presumption the defendant should have made it appear affirmatively upon the record that such notices were not given, if by so doing he could on a motion in arrest of judgment have derived any benefit therefrom. The statute requiring these notices to be given is directory, and if it was shown by the record that they had not been given, we would still question the defendant's power to derive benefit therefrom.

The fourth ground of this motion in arrest of judgment is that it appears by the record that the jurors who served at the term of the court were drawn by "R. M. Witherspoon, C. J. Thomas, T. Ellison, deputy sheriff, and John M. Beggs, Clerk of the Circuit Court," and the drawing was illegal in that they should have been drawn by the clerk

in the presence of the sheriff, (or in his absence the deputy sheriff,) and county judge. As a matter of fact, it does not so appear. If the papers following the bill of exceptions were introduced in evidence to prove the allegation, they should have been incorporated in the bill of exceptions; this has not been done and they cannot be treated as evidence by this court.

The fifth ground of the motion for arrest is, that it does not appear by the record that at the meeting of the county judge, deputy sheriff and clerk, for the purpose of drawing the jurors to serve at the term, the sheriff made proclamation of such meeting and its purpose at the door of the court house.

The remarks made as to the third ground of the motion are applicable to this.

10. Absence of signature and seal from charge.

There was no request in writing before the evidence closed that the judge should charge in writing, and consequently the judge had the legal right to charge orally, and not being placed under a legal duty to charge in writing, the plaintiff in error cannot require the formalities requisite to a charge in writing, when it is made a legal duty.

As stated above, the instructions presented by plaintiff in error were in effect abandoned by him, by his not urging them until the judge ruled upon them. There was no ruling upon them to except to.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

As to the first assigned error, that the court overruled the plea in abatement and permitted the State Attorney to amend the indictment by filing a specification, we think the views held by the counsel for the defendant are not tenable. It was long ago held in England, under their laws,

that a person could have but one christian name, or that if he had, but one would be regarded by the law. This rule has been very generally adopted in this country, and seems to be well established in several of the States. In the case of the people vs. Cook, 14 Barbour, 259, 307, the court say: "It has been repeatedly held in this court, that the middle letter between the christian and surname does not prejudice, even in judicial proceedings and in conveyance of estates. It is no part of the name, for the law knows only of one christian name."

In the case of the State vs. Manning, 14 Texas, 402, the court say: "It seems well settled that an initial letter, interposed between the christian and surname, is no part of either. (Bratton vs. Seymour, 4 Watts, 329.) And it would seem to follow that it is immaterial whether one be introduced, which the party is not accustomed to use, or one be omitted which he is accustomed to use, or whether those used by him in writing his name be transposed. In neither case would it amount to a misnomer."

In the case of Edmundson vs. The State, 17 Alabama, 179, the court say: "But it is contended that the improper insertion of the middle letter 'L.' in the name constitutes a misnomer. We do not think so. There are, it is true, authorities which go to that extent, but we think the better opinion is, 'that the law knows only of one christian name,' and that the middle letter forms no part of it, so that its insertion or omission makes no difference and may be disregarded." See also Keene vs. Meade, 3 Peters, 1; Rex vs. Newman, 1 Ld. Ray, 562; Roosevelt vs. Gardiner, 2 Cowen, 463; Franklin vs. Talmadge, 5 Johnson, 84; Milk vs. Christie, et al., 1 Hill, 102; Erskine vs. Davis, 25 Ill., 251; State vs. Martin, 10 Mo., 391.

But, had the insertion of the middle letter in the name of the defendant, as used in the indictment, been held bad, the defect was amply cured by filing, under the order of

the judge, the specification making such indictment more definite, by striking out such initial letter. Such amendments are permitted in the English courts. By statute 7, Geo. 4, chap. 64, it is provided, "that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or want of addition, or of wrong addition, of the party offering such plea, if the court shall be satisfied by the affidavit or otherwise of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon the party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded."

In our own State, we have a statute under which the specification in this case was filed, and the amendment made, chapter 1107, laws of 1861, approved February 2, 1861, §3 provides: "That at any time, either before or after trial, when it shall appear to the court, on the application of the accused, that the vagueness of the indictment would expose the accused to substantial danger of a new indictment for the same offence, it shall be the duty of the said court to require the solicitor to specify in writing the details of the offence charged against the said accused with sufficient distinctness as to obviate the said objection, which specification shall constitute a part of the record in said case." While this statute does not in express terms warrant an amendment so as to cure a misnomer, still in the language of the first section, it embraces "any defect in the form of the indictment" which, in the opinion of the court, makes it "so vague, indistinct and indefinite, as to mislead the accused and embarrass him * * * in the preparation of his * * * defence, or expose him, * * * after conviction or acquittal, to substantial danger of a new prosecution for the same offence." The court very properly permitted the filing of the specification in abundance of caution to protect the defendant in case of

his acquittal or conviction from the danger of a new prosecution for the same offence.

The indictment charges that the defendant "did make an assault by placing said musket gun to his shoulder, the muzzle of said musket gun, loaded as aforesaid, pointing toward the said M. H. Wearing with intent," &c. We think the acts constituting the assault are sufficiently set out, and that the indictment is not in this respect "vague, indistinct or indefinite," and therefore that the second ground of error is not well taken.

The third assignment of error was abandoned by the counsel for the plaintiff in error on the argument.

The fourth error alleged is that the court erred in permitting the witness Cobb to testify after the defence had rested, his evidence not being in rebuttal of any matter introduced on the part of the defendant, but cumulative on the part of the State. Courts are intrusted with a discretion in regard to the introduction of evidence and the examination of witness; this discretion should be exercised in furtherance of justice; when formal proof has been omitted they have allowed witnesses to be called, and other proof given at any time before the jury retire. When the plaintiff's attorney by an accidental omission does not examine a witness who was present in court, and a non-suit is moved for after resting his case, the court has permitted the witness to be examined in furtherance of justice. It must be a strong case, showing that injustice has been done the party, and that a sound discretion has not been exercised, which would induce this court to interfere to disturb the judgment of the Circuit Court, by revising the exercise of that discretion with which they are entrusted in regard to the relaxation of the rules of evidence. In the case of Coker and Schiffer vs. Hayes, 16 Fla., 368, this court said: "A party, after closing the examination of a witness, and after closing his testimony, has no absolute

right to recall a witness before examined by him to establish matters not in rebuttal, or to simply repeat his testimony. * * * Whether this rule ought, or ought not to be varied, is a question for the Circuit Court; and a court of error, if it should interpose at all in such matters, should not do so except where it sees that injustice has been done through this action."

In Brown vs. Burrus, 8 Mo., 26, the court of that State says: "Material testimony ought not to be rejected, because offered after the evidence is closed on both sides, unless it has been kept back by trick, and the opposite party would be deceived or injuriously affected by it. So, after a witness has been examined and cross-examined, the court may, at its discretion, permit either party to examine him again, even as to new matter, at any time during the trial." Freleigh vs. The State, 8 Mo., 606; Law vs. Merrills, 6 Wend., 268; Jackson et al. vs. Talmadge, 4 Cowen, 150; Edwards vs. Sherratt, 1 East, 604; Mercer vs. Sayer, 7 John., 306; Rucker vs. Eddings, 7 Mo., 115; People vs. Mather, 4 Wend., 249.

The fifth and sixth assignments or error relate to the charge of the court to the jury.

It is sufficient to say with regard to these two alleged errors that no exception was taken and noted on the trial. At the conclusion of the charge the record shows only that the defendant by his attorney, did then and there except to the whole of said charge." We have frequently held that a general exception to the charge of the court is not available if any one of the propositions contained in such charge is correct. Dupuis vs. Thompson, 16 Fla., 69; John D. C. vs. State ex rel., 16 Fla., 554.

The same difficulty obtains with regard to the seventh error assigned. The record in regard to that reads as follows: "And the said defendant by his attorney, during the progress of said trial and while said judge was prepar-

ing his charge to the jury, reduced the following to writing and requested the judge to give the same specially in charge to the jury, to-wit: 'If you believe from the evidence that at the time of the alleged assault the defendant was walking along the streets of Madison, and was suddenly warned or informed by any one that Wearing or any one else was in the act of shooting him, he was justified in putting himself in at attitude of defence.' After the judge had concluded his charge to the jury, and not hearing any further request from counsel to give anything specially in charge, he the said judge neglected to give the above or the substance thereof in charge to the jury as requested." The defendant's counsel reduced this submitted charge to writing during the trial of the cause, he did not call the attention of the court to it subsequently, and took no exception to the neglect so to charge by the court. We must consider that the request was abandoned, and even if it were not, the failure to note an exception would render it unavailable.

The eighth asignment of error, viz: that the court erred in overruling defendant's motion for a new trial, cannot be sustained. The only other errors therein named, not herein before examined and disposed of, are that the verdict is contrary to evidence and the law. We cannot see that it is contrary to either. There was sufficient evidence to warrant the conviction by the jury. They are to pass upon the credibility of the witnesses and to determine the facts upon the evidence. This court will not in such a case attempt to disturb the verdict.

The ninth ground of error, to-wit: that there was error in overruling defendant's motion in arrest of judgment, upon the several grounds mentioned in such motion before the court below, is not before the court. Appended to the record and certified by the clerk are two papers; one purporting to be extracts from the records of the proceed-

ings of the County Commissioners in the following language:

"MADISON, FLA., January 2, 1879.

J. M. Beggs, Clerk of Court:

DEAR SIR: Attached you will find a list of registered voters, set aside by an order of the Board of County Commissioners of Madison county, at their regular meeting this day, A. D. 1879, from which the jurors for the courts of the present year are to be drawn.

JOHN L. INGLIS,
Chairman Board Co. Com."

Here follows a list of names.

The second paper reads as follows:

"MADISON C. H., FLA., March 13, 1879.

"We the undersigned, R. M. Witherspoon, C. J., Thomas J. Ellison, deputy sheriff, and John M. Beggs, Clerk of the Circuit Court, met in the clerk's office this day and proceeded to draw the grand and petit jurors for the spring term of the Circuit Court for April 21, 1879, whereupon the following persons were drawn, to-wit:

"Grand Jurors, Petit Jurors."

Here follows list of names.

These papers are not embodied in the bill of exceptions, and the Judge of the Circuit Court has in no manner certified to them, or that they were ever used upon the trial of the cause or on the motion in arrest of judgment. They are, therefore, no part of the record, and can be of no avail in this court. All evidence used in the proceedings and upon motions subsequent to the verdict should be embodied in and made a part of the bill of exceptions in order to enable this court to review them. We have said in Gallaher vs. State, 17 Fla., 370, that "the bill of exceptions is a simple history of the case as tried, and should contain nothing more nor less than the facts as they appeared to the court and jury, from the commencement of the trial until the

final judgment by the court. All objections, rulings by the court and exceptions should appear in the body of the bill of exceptions in their proper and appropriate place, and will not be considered if upon separate pieces of paper filed subsequent to the verdict, or in cases of motion for new trial, or in arrest of judgment after final judgment."

Aside from the fact that there is no such bill of exceptions as is required to present any question of that character to this court, if it had been properly raised, we are of the opinion, that all objections to the legality of grand jurors must be made by plea in abatement to the indictment before pleading in bar. Such is the rule as announced by this court in Gladden vs. The State, 13 Fla., 623, where the court say: "Such matters are reached by plea in abatement only, (though in some States a challenge to the array is treated, we do not say properly so, as a substitute for a plea in abatement,) and matters in abatement in criminal as well as in civil cases must be pleaded before pleading in bar."

The tenth and last error assigned is that the court erred in not signing and sealing his instructions to the jury.

Section 1 of Chapter 2096, laws of 1877, approved March 2, 1877, provides that in common law and criminal cases the judge's charge shall be wholly in writing. Section 2, however, provides: "That the several judges of the Circuit Courts of this State may charge juries trying all appeals from the justices of the peace in civil and criminal cases, and all felonies not punished capitally, and misdemeanors, orally, unless they are requested by the State Attorney, or attorneys for defendants or plaintiffs, or the parties themselves, to charge said juries in writing as declared in the foregoing section, which request shall be in writing, before the evidence in the case is closed."

There is no evidence in the record that the judge of the Circuit Court was requested to charge the jury in writing.

Had he been so requested before the evidence in the case was closed, it would have been error to have neglected or refused so to sign and seal his charge.

The judgment of the court below is affirmed.

ADOLPH MONTAGUE, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. If it appear upon a *voir dire* examination that a proposed "juror's conceptions are not fixed and settled, nor warped by prejudice, but are only such as would naturally spring from public rumor or newspaper report, and his mind is open to the impressions it may receive on the trial, so as to be convinced according to the law and the testimony, he is not incompetent." (O'Connor vs. The State, 9 Fla., 215.)

2. An indictment was presented by a grand jury against one E. M. for an assault with intent to commit a rape, and also against A. M. for being present, "aiding, abetting and assisting the said E. M. the felony and intended rape to do and commit;" *Held*, That A. M. was indicted as a principal and not as an accessory, and, in the discretion of the court, might be tried either before or after E. M.

Writ of Error to the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

H. Bisbee, Jr., and *J. D. Thompson* for Plaintiff in Error.

The Attorney-General for the Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

On the sixteenth day of December, A. D., 1879, the

grand jury of the county of Duval presented an indictment against Ellis Moon for making an assault with intent to commit a rape upon the person of Adaline Warren, and alleging in the same indictment that this plaintiff in error was feloniously "present, aiding, abetting, and assisting the said Ellis Moon, the felony and intended rape to do and commit, contrary, &c."

On motion an order of severance was made, and on the fifth day of January, A. D., 1880, the defendant Adolph Montague was tried on a plea of not guilty, and was found guilty by the jury. He moved for a new trial which was overruled, and he was sentenced to two years confinement at hard labor in the penitentiary.

A bill of exceptions appears in the record, a writ of error thereon was allowed, and the counsel for the defendant assigns the following errors:

First. The court erred in overruling the challenge for cause of T. J. Mott, and in compelling the accused to challenge the said T. J. Mott peremptorily.

Second. It appears that the accused has been indicted and tried as accessory, and it does not appear from the record that the principal has been tried and convicted.

The record in regard to the first alleged error assigned recites that "thereupon came T. J. Mott who was tendered as a juror to sit in the trial of said cause, who, on being examined on his *voir dire* as touching his qualifications as a juror, answered, that he had formed and expressed an opinion as to the guilt and innocence of the defendant; that his opinion was formed from rumor, and from reading the evidence reported by the newspapers to have been taken at the preliminary examination, but that he could give the defendant a fair and impartial trial according to the evidence and the law, as given in charge by the court, and that he was not sensible of any bias or prejudice for or against the defendant. The said defendant by his attorney

did then and there challenge the said juror for cause or for principal cause. * * * The said judge did then and there deliver his opinion and decide that the said objection and challenge should not be allowed, and overruled said objection and challenge." To this decision of the court the counsel for the defendant took an exception. The counsel for the defendant then challenged the juror peremptorily.

This exception is not well taken. In the case of O'Connor vs. The State, 9 Fla., 215, this very question was passed upon. There this court adopted the rule embodied in the following extract:

"The true doctrine is, that if the juror's conceptions are not fixed and settled, nor warped by prejudice, but are only such as would naturally spring from public rumor or newspaper report, and his mind is open to the impressions it may receive on the trial, so as to be convinced according to the law and the testimony, he is not incompetent."

In this case this juror was subsequently challenged peremptorily by the defendant and another juror was empanelled, to which there was no objection. It does not appear that the defendant had exhausted his peremptory challenges, or suffered any injury; but it does appear that he was tried by a jury above all exceptions.

The second assignment of error is equally invalid. The defendant was indicted for being "feloniously and ravishingly present, aiding, abetting and assisting the said Ellis Moon, the felony and intended rape to do and commit." He was indicted as a principal, and not as an accessory before or after the fact. An accessory before the fact is one who, though absent at the time of the commission of the felony, doth yet procure, counsel, command or abet another to commit such felony. (Wharton Crim. Law, §134.) An accessory after the fact is one who, when knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon, whether he be a principal or an

accessory before the fact merely. Wharton Crim. Law, §146.

Principals in the second degree are those who are present, aiding and abetting at the commission of the act. *Ib.*, §116.

Chapter 1637, Laws 1868, sub-chapter 11, section 3, is as follows: "Whoever aids in the commission of a felony * * * shall be punished in the same manner prescribed for the punishment of the principal felon."

In this case it was not necessary to try Moon first. They were both indicted as principals in an assault with intent to commit rape. The law is well settled that the party charged as principal in the second degree may be convicted, though the party charged in the first degree is acquitted; and the court may, in its discretion, try the principal in the second degree before the principal in the first degree. Boyd vs. State of Georgia, 17 Georgia, 194, and cases there cited; Wharton Crim. Law, §130, and cases cited; The State vs. Ross, 29 Mo., 32.

The judgment is affirmed.

JOSHUA L. MCGAHAGIN, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

An indictment which charges in one count two distinct offences, for which different punishments are provided by statute, is bad, and judgment thereon will be arrested.

Writ of Error to the Circuit Court for Marion county.

The facts of the case are stated in the opinion of the court.

Jesse H. Goss and Gary & Dunn for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

On the 13th day of November, 1878, the defendant, Joshua L. McGahagin, was indicted by the grand jury of Marion county, which said indictment recites that the said defendant, "on the second day of November, in the year of our Lord one thousand eight hundred and seventy-seven, with force and arms, at and in the county of Marion aforesaid, wilfully and maliciously did *shoot, disfigure* and *injure* one ox of the value of thirty dollars, of the property, goods and chattels of," &c.

There is but this one count in the indictment, and upon that the defendant was tried at the spring term of said court, in the year one thousand eight hundred and seventy-nine, and the jury found him guilty. The counsel for defendant then moved in arrest of judgment upon several grounds, among which is the following:

"The indictment charges two distinct and separate felonies, to-wit: the disfiguring an ox under the 74th section of an act approved the 6th day of August, A. D. 1868, and for injuring an ox under the 79th section" of the same act.

Counsel also moved for a new trial for several assigned reasons; both of which motions were denied by the court; and the defendant was sentenced to pay a fine of ten dollars and the costs. From this judgment he brings his writ of error.

This indictment must have been found either under the act of 1868, chapter 1637, approved August 6th, 1868, or under the act of 1871, chapter 1846, approved January 27, 1871. The statute of 1871 provides "that whoever, not having a sufficient fence or other enclosure to prevent the intrusion of animals upon his premises, shall, in attempting

to expel therefrom any horse, cow, hog or other animal of another person found intruding thereon, kill, maim, wound or disfigure any such animal, shall be held guilty of a misdemanor," &c. This indictment, if framed under this statute, does not follow the language, nor is it in language of equivalent import, and, therefore, is not sufficient to warrant the verdict of the jury in this case. It was necessary to allege and prove, if the indictment was framed under it, that the defendant did not have "a sufficient fence or enclosure to prevent the intrusion of animals upon his premises." This court has frequently held that "where the offence is one prescribed and defined by statute, it must be charged in the very language of the statute, or in language of equivalent import." Humphreys vs. The State, 17 Fla., 381; Snowden vs. The State, *Ib.*, 386; Dennis vs. The State, *Ib.*, 389.

Section 74, of sub-chapter four of chapter 1637 of Laws of 1868, is as follows: "Whoever wilfully or maliciously kills, maims or disfigures any horse, cattle or other beast of another person, * * * shall be punished by imprisonment in the State Penitentiary not exceeding five years, or by a fine not exceeding one thousand dollars, *or* imprisonment in the jail not exceeding one year."

Section 79 of the same chapter provides that "whoever wilfully and maliciously destroys or injures the personal property of another, in any manner or by any means not particularly described or mentioned in this chapter, shall be punished by imprisonment in the State Penitentiary not exceeding five years, or by fine not exceeding one thousand dollars, *and* imprisonment in the jail not exceeding one year; provided," &c.

The penalties imposed by these two sections are different in degree, while they each provide for imprisonment in the State penitentiary for a term not exceeding five years, one provides a fine or imprisonment in the jail, while the other

contemplates both a fine *and* imprisonment in the jail, at the discretion of the court, not exceeding, however, the limits fixed by the statute.

This indictment charges two distinct offences in one count, to-wit: "disfiguring" an ox under the 74th section and "injuring" an ox under the 79th section. It cannot be said in this case that the word "injure" as used in the indictment is mere surplusage, for the reason that the injury of personal property not otherwise "described or mentioned" in the statute, is made a felony. The criminal law never permits the joinder of two or more distinct offences in one count of an indictment. The verdict of the jury was a general one of "guilty," in no way designating of which offence the defendant was so guilty.

Whether, had the verdict acquitted the defendant of one of the offences and found him guilty of the other, the defect might have been cured by the verdict, it is not necessary to determine. Before trial the indictment was demurrable for duplicity, or the defendant could have moved the court to quash it; he failed so to do and now moves in arrest of judgment. There are cases in which all the circumstances necessary to constitute different crimes may be alleged in one count of an indictment, and yet be sufficient in law. These are cases where the offence described in the count is a complicated offence; as in an indictment for murder, which comprehends all the circumstances that go to constitute manslaughter; or in other crimes, where the lesser constitutes an essential part of the higher crime, and is merged in a conviction for such higher crime. This case is not an instance of an indictment setting out in one count a complicated offence, embracing various circumstances, which in themselves amount to offences, but it is a single count setting out two distinct and independent offences, which had no necessary connection with each other. The indictment is, within the meaning of chapter 1107, laws of

1861, "so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defence," &c., and we do not see that it was enacted to apply in a case of this kind. It was never intended by the Legislature in the passage of that act to compel the courts to try a prisoner for two or more distinct and separate felonies or crimes charged in an indictment containing but a single count. Bishop on Crim. Pro., §432; People vs. Wright, 9 Wend. Rep., 193; Commonwealth vs. Symonds, 2 Mass., 163; United States vs. Sharp, Peters, c. c. 131; State vs. Fowler, 8 Foster, N. H., 184; State vs. Nelson, 8 N. H., 163; State vs. Merrill, 44 N. H., 624.

It is not necessary to notice the other errors assigned, as the judgment of the court below must be arrested.

CLAIBORN GREEN, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. In criminal cases, especially in felony, where the penalty is severe, the court will weigh the evidence, and where, in its opinion, it preponderates so strongly against the verdict that it cannot conclude such verdict was founded upon the evidence on the part of the State, no testimony having been introduced on the part of the defendant, a new trial will be granted.

2. The defendant in a criminal case, having caused his witnesses to be duly and properly subpœnæd to appear at the trial, is entitled under the statute upon a proper case being made to an attachment to compel their attendance as such witnesses; and it is error to compel such defendant to go to trial in such case without first having issued such process and used reasonable means to procure their attendance.

3. Section 21, of chapter 1628, laws of 1868, does not contemplate the

issuing of a special venire in order that the officer may summon by-standers to complete the panel of a jury exhausted by reason of challenges or otherwise. The requisite number may be summoned by the officer upon the order of the court then and there. It is not necessary for the officer to make a formal return of those summoned, as the whole proceedings are held in open court, and are embodied in its minutes.

4. It is no objection to an indictment in this State, under chapter 1107, laws of 1861, that two or more offences are joined in separate counts, unless on an application to quash the indictment, or on a motion in arrest of judgment, the court shall be of opinion that the indictment was so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense, or expose him after conviction or acquittal to danger of a new prosecution for the same offense.

5. When a prisoner, tried upon an indictment containing two counts, one for assault with a dangerous weapon with intent to murder, the other for assault with a dangerous weapon with intent to rob was found guilty by the jury of an "assault with intent to rob;" *Held,* That the legal effect of the verdict was to acquit the prisoner of the assault with intent to murder.

Writ of Error to the Circuit Court for Alachua county.

The facts of the case are stated in the opinion of the court.

Thrasher, Davis & Hampton for Plaintiff in Error.

State Attorney had no right to three challenges. Act 1877, page 54, sec. 7.

Defendant had a right to a list of 18 jurors from which trial jury was to be drawn, and which 18 had to be exhausted before calling from by-standers. Act 1877, page 53, sec. 3.

Defendant had a right to have a list of the by-standers called, but no list or return was made, only one being called at a time and put upon the prisoner. Act 1868, page 20, sections 21, 22, 23.

The indictment was double and was not good, and the

judgment should have been arrested, because of the two offences charged. 12 Wend., N. Y. Rep., 425.

The verdict was contrary to law, the evidence upon which it was founded being purely circumstantial and based solely on a *track,* without any connecting link joining defendant with it.

Defendant was forced to trial without his witnesses, who had been regularly subpœnaed, and without attachment issuing for witnesses, and hurried into trial without time to draw affidavit for continuance, he having been in jail for a long time, and just then brought in court, and no opportunity to look after his witnesses.

The newly discovered evidence of Isaac Shelton, is enough to warrant the court in granting new trial.

The Attorney-General for Defendant in Error.

The first assignment of error is that the court refused to grant a motion for a new trial on the grounds set forth in a motion for a new trial.

Perhaps I had as well say nothing about the first four grounds of motion for a new trial.

The fifth ground is "because the counsel for defendant was not furnished with a list of eighteen petit jurors as the law requires. The record does not show that a list of 18 was applied for. If it is meant by this assignment of error to intimate that eighteen petit jurors should have been selected instead of twelve, the record does not show that it was proven on the trial that there were over one thousand registered voters in the county. Courts do not take judicial knowledge of the number of registered voters in a county. If there was any such exception it should have been taken by challenge to the array, and cannot be reached by a motion for a new trial, or in arrest of judgment. Chitty's C. L., 545.

The sixth ground is overthrown by the judge's statement that only two jurors were challenged peremptorily by the State Attorney.

The seventh ground is hardly tenable. It is the settled practice to do as was done in this matter by Judge Dawkins. The view of opposing counsel is novel in this State, and the statute does not require such practice. I do not mean to say that it would be illegal to summon a number at once. No harm is shown by the record to have been done the prisoner. Such matters rest in the sound discretion of the court.

The ninth ground has no affidavit to sustain it.

The eighth and tenth grounds of motion for a new trial, and the grounds of the motion in arrest of judgment, relate to an election on the counts of the indictment.

There was no error in the ruling of the court on these points. 1 Bishop Crim. Pro., §457, note E and authorities; *ib.*, sec. 459; McGregg vs. State, 4 Blackf., 101; Mayo vs. State, 30 Ala., 32, 33, 34; Chapter 1107, Laws of Florida.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

In April, 1879, the grand jury in and for Alachua county presented to the Circuit Court of that county an indictment against this plaintiff in error containing two counts, one for assault with a dangerous weapon with intent to murder, the other for assault with a dangerous weapon with intent to rob.

On the 19th of November, 1879, Green was tried upon the indictment, and found guilty of "assault with intent to rob," and sentenced to confinement at hard labor in the State prison for the term of twenty years.

After the evidence in the case was closed, the counsel for

the prisoner "asked the court to compel the State Attorney to choose upon which count in the indictment he would proceed to prosecute, which request the court refused," to which ruling and decision the counsel for prisoner excepted.

Before sentence a motion for new trial was made upon the following grounds:

1. Because the verdict was contrary to law and the evidence.

2. The evidence was not sufficient to warrant a verdict of guilty.

3. Because the defendant was forced to trial without his witnesses, who had been regularly subpoenaed.

4. Because, had his witnesses been present, defendant could have proved that he was sick at his home from eight to twelve o'clock on the night of the attempted robbery.

5. Because defendant's counsel was not furnished with a list of eighteen jurors at the trial, as the law requires.

6. Because the State Attorney challenged peremptorily three of the regular panel furnished to defendant's counsel, when, by law, he was only entitled to two challenges.

7. Because, after the regular panel was exhausted, the sheriff called persons from the by-standers to complete the jury, one at a time, and put them on the defendant.

8. Because the court refused to compel the State Attorney to elect upon which count he would prosecute.

9. Because since the trial defendant has discovered evidence by which it would appear that defendant was at his own house on the night of the said attempted robbery from half-past nine until after eleven o'clock.

10. Because two separate and distinct offenses, and not of the same character, were charged in the indictment, and the State was allowed to proceed upon both counts.

The court overruled the motion and the counsel for defendant excepted.

The counsel for the defendant then moved in arrest of

judgment, assigning for reason therefor the tenth reason assigned on the motion for new trial. The court denied the motion and defendant's counsel took an exception.

From the judgment of the court this defendant brings his writ of error, and assigns the following errors:

In refusing to grant a new trial upon the several grounds set forth in his motion for new trial, and in refusing to arrest the judgment upon the ground taken in his motion for arrest of judgment.

The first and second reasons assigned on motion for new trial were that the verdict was contrary to law and the evidence in the case.

F. A. Underwood, the first witness introduced upon the part of the State, testified that "while sitting with his wife "and children at eight o'clock at night, the doors of my "house closed, I heard a considerable noise in my yard near "the house, and it appeared as if some one was having a "combat with my dogs in the yard. I opened the door "and stepped out of the house. No sooner was this done "than I was fired upon—one buckshot going through my "pant's leg near the foot, and some others took effect in the "palings; discovered there next day. I could see persons, "but could not discover who they were. They ran off, and "I went back into my house and closed the door. About "twelve o'clock the same night some persons knocked my "door down with a heavy piece of timber. I jumped up "and went to door; there were three parties; don't know "who they were. One was standing on the door steps, "rather in shade of the house and immediately in front of "me. The other two men were standing off from door "steps ten or fifteen feet, where the moonshine fell upon "them. I stood in door a moment, and the one on door "stepped back to where the moonshine fell upon him. I "did not recognize either of them. There were orange "trees in the yard, but the moon shone directly on these

"parties. Two of them ran off straight from the door to "a fence that surrounded the yard. I could see them as "they ran off, and could see them until they nearly reached "the fence. The other one did not run straight off, but "turned to the left corner of the house from the way I was "standing and I saw no more of him. Next morning I "went for some neighbors and my son, and we examined "the premises. We could only follow the tracks about "three hundred yards from the house; no trace could be "seen of them after this. The track of one of the party "*who ran straight from the house* was Claiborn Green's, the "the defendant; the other I did not know. I knew his "track because it is peculiar. He is bent-legged in right "leg and in walking his heel of right foot scarcely touches "the ground. I could discover it imperfectly at the door "next morning. One place it was plain at the door in run- "ning from the house at twelve o'clock at night. Green's "track was not so plain, because in running it was not so "plain as in standing or walking. He did not run all the "way after getting over the fence. It was in ground that "had been tended that year, and there his track was plain. "I have known Claiborn Green for several years; he has "lived close to me part of the time; lived two miles from "me at the time of the occurrence. He has worked for me "off and on since I have known him. I never knew any- "thing wrong about him before this. There has never been "any falling out between us, or hard feelings. He has "always been a hard working boy, and has a wife and "children. * * * *

"Other colored people lived as near me as Green; one of "them is bent-legged like Claiborn, but makes a different "track. I knew both tracks—Claiborn's is the larger of "the two. The track of the party who turned to the left "corner of the house, and who did not run straight from "door to fence, took a circuitous route and joined the other

"two about the point where we failed to make other traces "of the track. We tracked him plain in the circuit made. "*This circuitous track was not Claiborn Green's.*"

John Underwood, son of the complainant, testified that the next morning after the assault upon his father's house he "examined the tracks about the yard and through the fields to where they could not be tracked further. I could plainly see Claiborn Green's track in the yard. I know his track well; he makes a different track from any one I ever saw. He has a bent leg, right bends in, and in making track in walking the heel of the bent leg hardly touches ground. It is a large track. * * * * I saw the circuitous track where it turned to left of house and met up with and joined the other, two or three hundred yards from house. *The Claiborn Green track is the one that turned to left of house and made the circuitous route to the left* and joined others as stated. I swear further that neither one of the tracks made by the men who ran straight from the door was Claiborn Green's. We never measured the track at all. Two other colored men live in neighborhood; make track crooked, and have bent legs; but their tracks are different from Green's—the defendant Green's is larger."

Annie Cone, another witness on part of State, testifies to the fact of her being at complainant's house "two nights and a day after the disturbance. I could plainly see one track made by Claiborn Green at the door step, only one." She further testified that there "are two men whose legs are almost in same fix with defendant's, who live in the neighborhood; but their tracks differ from defendant's, though they walk on front of foot and heels hardly touch the ground. Green's track was a much larger track than the others, and very distinct from the other two."

Another witness swears the track was that of the defendant; that he was a shoemaker, and had made shoes for defendant.

This is the substance of the evidence given on the part of the State. We think it cannot be insisted upon successfully that there was sufficient to warrant the finding of the jury, that defendant was guilty of an assault with intent to rob. The two principal witnesses, the complainant and his son, both having equal opportunities for the examination of the tracks found, (the only evidence of the guilt of the prisoner,) testify in direct opopsition to each other—the one identifyingfying the tracks leading from the door of the house to the fence, and the other those leading to the left of the house and by a circuitous route to where it joined the others, two or three hundred yards from the house. The evidence of Annie Cone is certainly insufficient; she saw only one track which she identified as that of the defendant, and that two nights and a day after the alleged assault was made. Green may have been there in the meantime, and there is no evidence to connect that one track with the actual assault.

The same difficulty arises in the case of the evidence of the shoemaker, and, besides that, it is evidence that the track examined and sworn to be Green's was that of a man barefooted or without shoes. In criminal cases this court will weigh the evidence, especially in a case of felony, where the penalty is so severe, and where, in our opinion, it preponderates, as in this case, so strongly against the verdict that we cannot conclude that it was founded upon evidence upon the part of the State, no testimony being introduced by defendant, will grant a new trial; and such should be the course in all courts where such trials are had.

And further, there appears to be no testimony showing any attempt to commit robbery.

In the case of Leake vs. The State, 10 Humph., 144, the court say: "We have repeatedly had occasion to assert that in criminal cases we will weigh the evidence, and, if it preponderates against the verdict, grant a new trial. And

we do this out of the great regard in which the law holds life and liberty, declaring, as it does, that in every instance where either the one or the other is sought to be assailed by a criminal prosecution, the guilt of the person charged shall be established beyond a reasonable doubt. In administering the law with this benign provision in favor of criminals, it would be mockery in a court of last resort to hold that upon an application for a new trial it would not weigh the evidence, but hold the verdict of the jury conclusive of the criminal's guilt, if there were any proof by which it could be sustained. This would be to place no higher estimate upon life and liberty than upon property, and to subject them to the same rule in relation to this particular." See also Bishop on Crim. Procd., §1105 and 6; Copeland vs. The State, 7 Humph., 479; Cochrane vs. The State, *Ib.*, 544.

The third ground upon which the motion for a new trial was based is that the defendant was forced to trial without his legally subpœnaed witnesses. The record discloses the fact that when this case was called for trial, the defendant's witnesses, three in number, who had been subpœnaed, were not present, that the counsel for the defendant asked for attachments against these witnesses, and that the court refused to allow such attachments to issue, and declared that it was defendant's business to see that his witnesses were in court, that the case would proceed to trial, and gave defendant's counsel no opportunity to make the necessary affidavits for a continuance of the case. It further appears from the record, that the defendant had been in jail for eight months and was brought from there into court on that occasion. It is true the judge says in the bill of exceptions, in connection with these other facts that appear therein, "the case was called on Monday, and set down for trial on Wednesday morning, nothing then said about absence of witnesses." There is no doubt from the record but that

the witnesses had been subpœnaed and were not in attendance on the day when the case was tried. The defendant had a right to have his witnesses present for examination, and in asking for an attachment from the court, he was asking only what he was in justice and in law entitled to. It was a matter of no moment that the cause had been set down for the day on which it was tried; if the defendant had caused his witnesses to be duly subpœnaed, and they had failed or neglected to appear in pursuance of such subpœna, he was entitled to the process of the court to compel their attendance, and reasonable time should have been granted for making the necessary proof, which if sufficient would have authorized the issuing of the attachments. It is provided by statute that where a witness has been duly summoned, and shall fail to appear, that it shall be the *duty* of the court, on motion, to order an attachment against such defaulting witness, returnable at such time as the court may direct. Thomp. Dig., 334, §2.

The defendant claims by his fourth ground for new trial, that had his witnesses been in attendance on the trial, he could have proved that he was sick at his house from eight to twelve o'clock, on the night of the alleged attempted robbery.

The verdict of the jury might have been different, had the defendant procured his witnesses under the attachment which it is made the *duty* of the court, on due proof of summoning, to grant.

The fifth ground assigned for new trial, that defendant's counsel was not furnished with a list of eighteen jurors, is not tenable. There is no evidence contained in the record that the county of Alachua contains more than one thousand registered voters, and the court cannot take judicial notice that such fact exists. The presumption is, that the proper officers have performed their duties in respect to the drawing of the jury, in pursuance of the law. There is

also no evidence in the record that any challenge or exception was taken to the list of the twelve jurors as presented to defendant's counsel by the clerk, on his application.

The sixth ground for new trial, that the State peremptorily challenged three of the regular panel of petit jurors, is also untenable. The court in the bill of exceptions in the case says: "The evidence before me as to the challenge of Bennett (the third person alleged to have been challenged by State Attorney peremptorily), clearly satisfied me that the deputy clerk made a mistake in so entering, though he thought it was correct. The sheriff, and counsel for the State, declaring that Bennett was not objected to by State Attorney, and the court upon investigation at the time, thought that the deputy clerk was mistaken in his entry as made." We must take the certificate of the judge, under his hand and seal, in the bill of exceptions, as correct in regard to this point.

The seventh point, or ground of motion, to-wit: that the sheriff called by-standers to complete the jury, one at a time, and did not furnish a full list of such by-standers, is in our opinion not well taken.

The statute (Chap. 1628, Laws of 1868, §21,) provides that "when, by reason of challenge or otherwise a sufficient number of jurors, duly drawn and summoned, cannot be obtained for the trial of any cause, civil or criminal, the court shall cause jurors to be summoned from the by-standers, or from the county at large, to complete the panel." This statute does not contemplate the issuing of a special venire, but provides that when the regular panel of jurors has been exhausted, the court shall cause the requisite number necessary to try the cause then pending to be immediately summoned from the by-standers. They must be "such as are qualified and liable to be drawn as jurors, according to the provisions of law." The number so to be summoned must be sufficient to complete the jury to be empanelled for the trial of such cause, and it is not neces-

sary for the sheriff or other officer to make and sign a written return, as the whole proceedings are had in open court, and appear upon its minutes. The by-standers so summoned are subject to the same challenge as to qualification as are the jurors in the regular panel. (O'Conner vs. State, 9 Fla., 215.) But even if the objection was good the defendant could not avail himself of it here. It nowhere appears in the record or otherwise that he has been "injured by the irregularity," nor does it appear that "any objection was made before the returning of the verdict." The statute provides (chapter 1628, §26,) "no irregularity in any writ of *venire facias,* or the drawing, summoning or empaneling of petit jurors, shall be sufficient to set aside a verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the returning of the verdict." The first and only objection appearing in the record was taken after verdict and upon motion for a new trial.

The ninth ground for new trial, that defendant has discovered evidence material to his defence, it is not necessary to pass upon, inasmuch as we have already said there was not sufficient evidence on the part of the State to warrant the verdict.

The eighth and tenth grounds for a new trial, and also upon which a motion was made in arrest of judgment, viz: that two separate and distinct offences, not of the same character, were charged in the indictment in two distinct counts, and that the court refused to compel the State Attorney to elect upon which count he would prosecute, will be considered together. Whatever may have been the rule at the common law, with respect to the joinder of offences of the grade of felonies in one indictment, the question is settled by a reference to the statutes of this State. Chapter 1107, laws of 1861, was evidently adopted with particular reference to the question which is raised in this case. The

language of that statute is: "That no indictment shall be quashed, or judgment in a criminal case be arrested, or new trial granted, on account of any defect in the form of the said indictment, or of misjoinder of offences, * * * * unless the court hearing and deciding upon any such application shall be of opinion that the said indictment was so vague, indistinct and indefinite as to mislead the accused and embarrass him, her or them in the preparation of his, her or their defence, or expose him, her or them, after conviction or acquittal, to substantial danger of a new prosecution for the same offence." In this case there is no pretence that the indictment was either vague, indistinct or indefinite, or that the accused was mislead or embarrassed in the preparation of his defence.

This defendant was convicted of an "assault with intent to rob," but not of "an assault with intent to rob, *being armed with a dangerous weapon,*" as charged in the indictment. The punishment of the offence of which he was convicted is, as provided by statute, (section 46 of subchapter III., of chapter 1637,) confinement "in the State Penitentiary not exceeding *ten* years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year." The court sentenced him "to confinement at hard labor in the State Prison for the term of *twenty* years."

Had he been convicted of assault with intent to rob, being armed with a dangerous weapon, and there was no other good ground for a new trial apparent in the record, the sentence would have been lawful under section 37 of the last named act. We feel it our duty to notice this point, although it has not been assigned as error.

The judgment is reversed, and a new trial ordered upon the count in the indictment charging him with intent to rob, the legal effect of the verdict being to acquit him of an assault with intent to murder.

KING CURRY, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. When the place of trial is changed from one county to another, it must be done in the manner provided by law, in order to give the court held in the county where such trial is had jurisdiction of the case, and such proceedings must appear in the record.

2. When the judge is of the opinion that it is impracticable or inexpedient to form a grand jury in any county for reasons mentioned in sub-chapter 13, section 14, of chapter 1637, laws of 1868, to make it lawful for the grand jury of any other county in the same circuit to indict any person for any offence committed in the county first mentioned in said section, such opinion of the judge should be embodied in an order and made a part of the record in the case.

Writ of Error to the Circuit Court for Brevard county.

The facts of the case are stated in the opinion of the court.

E. K. Foster and *John W. Price* for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

The record in this case contains two separate and distinct indictments found against King Curry and Thomas Thompson, at the Orange county special term, A. D., 1873. One of these indictments is for fraudulently altering the marks and brands of certain animals, the property of one Streete Parker, and contains also a count for larceny; the other is for a like offence in changing marks and brands of animals, the property of John Parker, and also contains a count for larceny. The indictments commence alike, and in the following manner:

"Orange county, to-wit: The grand jurors of the State of

Florida, empanelled and sworn to inquire and true presentment make in and for the body of the counties of Orange and Brevard, in the State aforesaid, upon their oaths," &c. They appear to have both been filed at the same time, October 31, 1873. The record then shows that on the first of March, 1878, *the case* came on for trial in Brevard county. That on motion of the State Attorney, "it was ordered that there be a severance in the trials of the defendants in *the case* of The State of Florida vs. King Curry, Thomas Thompson." It was also on like motion "ordered that a *nolle posequi* enter on the count in the indictment charging larceny as against King Curry." Curry was then arraigned, plead not guilty, was tried, found guilty, and sentenced to five years in the penitentiary. There is no bill of exceptions in the case and none of the evidence produced in the court below is before us. It does not appear in any way that the place of trial was ever changed from the county of Orange to the county of Brevard, nor is there any evidence embodied in the record to enable this court to determine upon which of the two indictments the plaintiff in error was tried and convicted.

Chapter 1637, laws of 1868, sub-chapter 13, §14, provides that "whenever it shall be, in the opinion of the judge, impracticable, or inexpedient to form a grand jury in any county, for the want of a sufficient number of qualified jurors therein, or on account of undue excitement or prejudice among the people, it shall be lawful for the grand jury in any county in the same circuit to indict any person for any offence committed in the county first mentioned in this section, and the trial thereof shall proceed in the county where such indictment may be found, subject to a change of the place of trial according to law."

It does not appear that the judge of that judicial circuit was of the opinion that it was impracticable or inexpedient for any of the reasons mentioned to form a grand jury in

the county of Brevard, where the defendant lived, and where the offences are alleged to have been committed. If he was of such opinion, it should have been embodied in an order and made part of the record.

From the record before us we cannot see that the court in Brevard county had jurisdiction to try this defendant, and the judgment for this reason must be reversed.

NEEDHAM BASS, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. Where an indictment in good form, endorsed "a true bill," signed by the foreman of the grand jury, filed by the clerk of the court, and properly endorsed by the State Attorney, appearing in the record, the prisoner having plead guilty, and no question having been raised as to its presentment in court by the grand jury, or objection taken, in the court below; *Held*, Such endorsement were sufficient evidence here of the presentmnt by a grand jury.

2. If there was any defect in the record in regard to the presentment by the grand jury, it should have been taken advantage of in the court below, where such defect might have been corrected.

3. Judges of Circuit Courts calling extra or special terms of their courts under chapter 1561, laws of 1866, have a right to direct as to what time such extra or special terms shall be adjourned. Thomp. Dig. 322, §4.

Writ of Error to the Circuit Court for Brevard county.

The facts of the case are stated in the opinion of the court.

E. K. Foster and *John W. Price* for Plaintiff in Error.

The Attorney-General for Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

The record in this case commences with an indictment against the plaintiff in error, John Tison and Frank Jernigan, containing two counts, one charging the three defendants with larceny; the other count with fraudulently altering the marks of certain animals. The caption and commencement of the indictment are as follows: "In the Circuit Court for the Seventh Judicial Circuit of Florida, Fall Term, A. D. 1875—The State of Florida vs. Needham Bass, John Tison, Frank Jernigan, larceny.

"Brevard county, to-wit: The grand jurors of the State of Florida empanelled and sworn to enquire and true presentments make in and for the county of Brevard aforesaid, upon their oaths do present," &c.

Attached to this indictment is the certificate of the Clerk of the Circuit Court, in and for Brevard county, "that the above indictment is a true copy of the original filed in my office, February 28th, A. D. 1878."

The endorsements are as follows: "Copy of indictment. In the Circuit Court for the Seventh Judicial Circuit of Florida, Fall Term, A. D. 1875. The State of Florida vs. Needham Bass, John Tison and Frank Jernigan. A true bill. William Shiver, foreman. Filed February 28, A. D. 1878, as for the Fall Term, A. D. 1875. John M. Lee, Clerk; T. E. Wilson, State Attorney."

On the 20th of December, 1877, the judge of the circuit, being satisfied that the public good and welfare and cause of justice required that a special term of the Circuit Court should be held in and for Brevard county, by an order appointed such a special term, to be held at the county site of said county, at Lake View, on the eleventh day of February, 1878. At chambers, on the sixth day of February, 1878, he issued an order to the sheriff of Brevard county direct-

ing him to adjourn the special term ordered to be held on the eleventh day of February, A. D. 1878, to the twenty-fifth day of February, A. D. 1878. The record then shows that on March 1st, A. D. 1878, the State Attorney moved for, and the court ordered, a severance in the trials of the defendants, and a *nolle prosequi* was entered on the second count of the indictment. The defendant, Needham Bass, was then arraigned on the count charging larceny, plead guilty, and was sentenced by the court to five years in the penitentiary.

The errors assigned are first, that there was no indictment properly presented by a grand jury and placed upon the files of the court, to warrant the subsequent action of the court; second, that the defendant was forced to trial without counsel, and that the plea of guilty was fraudulently obtained; and, third, that the term of the court at which the defendant was arraigned, plead guilty and was sentenced, was not a legal term, and, consequently, the court acquired no jurisdiction.

There is no bill of exceptions, and the record is very inartificially drawn. It shows, however, that the indictment was filed on February 28th, 1878, as for the fall term 1875; that the defendant was arraigned and plead guilty to the charge of larceny, and was duly and legally sentenced on the 7th day of March, 1878. There was no demurrer, or motion to quash the indictment, or motion in arrest of judgment. In the case of Frances, a slave, vs. The State, 6 Florida, 306, this court, with reference to an error assigned covering the grounds contained in the first error alleged in this case, say: "The appellant having plead not guilty to the indictment, and had two trials upon it in the court below, and having failed to take any notice of it, either on the motion in arrest of judgment, &c., or in her bill of exceptions, may, we think, be considered as having waived it."

In that case the record failed to show what judge held the court, the term when the indictment was found, when the case was tried, or that any grand jury was empanelled. They say: "In this case the grand jury may have returned a valid indictment into court, and the clerk may have neglected to record their finding, or having recorded it, he may (indeed must) have failed to copy it into the record sent up. Had the objection been made in the Circuit Court, it would of course have been very easily ascertained whether such a record existed or not, and if not, the bill being there, the fact in regard to its return could have been ascertained, and if a defect in the record existed, it could and doubtless would have been corrected." In the case of Collins vs. The State, 13 Fla., 652, this court say: "We are of opinion that there is no necessity for the insertion upon the record of a special entry stating the finding of the grand jury, and that it is sufficient if upon the record there is enough to show a delivery of the indictment into court by the grand jury."

"All that is required of the extended record is, that what that record contains, shows, according to the accepted legal significance of the terms in which it is framed, that the grand jury presented to the court an indictment for the particular felony with which the party is charged."

In the case at bar, the indictment is in proper form, and no objection was taken to it. It is endorsed "a true bill," properly signed by the foreman, filed by the clerk and endorsed by the State Attorney. Such file mark placed thereon, *nunc pro tunc*, by the proper officer of the court in term time, must have been made under and by virtue of an order of the court. This is sufficient evidence of the presentment by the grand jury, and no further or other evidence thereof is necessary in the extended record.

If there was any error in this respect, it should have been taken advantage of in the court below, where, if a de-

fect in the record existed, it could have been corrected. Gallaher vs. State of Florida, 17 Fla., 370; People vs. Blackwell, 27 Cal., 65; Townsend vs. State, 2 Black., 151; Terrell vs. The State, 41 Texas, 463; Long vs. State, 56 Ind., 133.

Chapter 1561, laws 1866, provides: "That the Justices of the Supreme Court, and the Judges of the Circuit Courts of this State be, and they are hereby authorized to order and hold extra and special terms of said courts whenever in their judgment the public welfare and cause of justice require the same; *provided,* That the order for such special terms of courts may be made either in term time or vacation." * * * This court in Barbour vs. The State of Florida, 13 Fla., 675, has held that this act is not repugnant to the letter or spirit of the Constitution of this State, "and that it is within the power of the Legislature to provide for the holding of such additional terms of the Circuit Courts at such times as may be deemed by the judges that the public welfare and cause of justice requires the same." In this case the Circuit Judge did issue his order appointing such additional or special term to be held at the county site of Brevard county, at Lake View, on the 11th day of February, 1878. Subsequently he ordered the sheriff to adjourn such term from the 11th day of February to the 25th day of February, 1878. In relation to the adjournment of the court, our statute, Thompson's Digest, 322, §4, provides that "when any judge shall not attend on the first day of any term, the court shall stand adjourned until twelve o'clock on the second day, and, if said judge shall not then attend, it shall be the duty of the clerk, at that time, to continue all causes and adjourn to such time as the judge may appoint, or to the next regular term by law established." The judge did direct to what time such special term should be adjourned, and such order was properly filed with the clerk of the court, and as the record shows

that this case came on to hearing on the first of March, we must presume that it was properly adjourned to the 25th day of February, in pursuance of such order of the judge.

The question as to whether Lake View is, or is not the county site of Brevard county is not raised by the record, and we must presume that the court was held at the place provided by law.

The errors assigned, in regard to the plea of guilty being obtained by fraud, and the defendant being forced to trial without counsel, are not sustained by anything appearing in the record. The defendant of his own volition plead guilty to the charge of larceny and was sentenced by the court.

The judgment is affirmed.

FRANK JERNIGAN, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

JOHN TISON, PLAINTIFF IN *ERROR*, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

(See Syllabus of Needham Bass vs. State, p. 685.)

Writs of Error to the Circuit Court for Brevard county.

E. K. Foster and *John W. Price* for Plaintiffs in Error.

The Attorney-General for the Defendant in Error.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

The plaintiffs in error in both of these causes were indicted in Brevard county, Seventh Judicial District, for

larceny, &c., jointly with Needham Bass. The court ordered a severance, and they severally plead guilty to the charge of larceny, and were sentenced to five years each in the penitentiary. The three cases were argued together, the several records being, so far as the questions presented are concerned, the same.

For the reasons assigned in the case of Needham Bass, Plaintiff in Error, vs. The State of Florida, decided at this term of the court, the judgment in each of these two cases is affirmed.

ANN E. WILSON, APPELLANT, VS. RUSS AND MERRITT, APPELLEES.*

1. Rents and profits, to which a *cestui que trust* is entitled, out of property held by a trustee, are proper subjects of sale, assignment, or pledge, to secure debts.

2. A paper in the form of a mortgage which in terms conveys real estate to secure a debt, the mortgagor having no legal title but only a right to the rents and profits for life, creates no lien upon the realty, but is good as an assignment or pledge of the rents and profits.

3. A trustee holding the legal title of land is a necessary party in a proceeding affecting the property or any interest therein; but when there is no trustee in being, at the commencemnt of suit, and a decree does not affect the title or the interest of a remainderman, the decree reaching only the net income of the property, a trustee may be appointed by the final decree, with proper directions as to the management of the property and the payment of the income.

4. If a trustee so appointed refuse the trust, a receiver may be appointed to protect the interests of all parties interested in the estate.

*[This case and the next following should appear among the other Equity cases of the present term and would had the copy of the opinions been furnished me in time.—REPORTER.]

5. A decree of "foreclosure" and sale with directions to put a purchaser in possession of land, in a proceeding by an assignee or pledge to subject the net income of the land to the payment of a debt for which such income is pledged, (the legal title and right of possession being, by the terms of the deed creating the trust, vested in a trustee), is not a proper decree. A decree in such case should direct the trustee or receiver to secure the due protection and management of the property and the application of the net income to the payment of the debt for which the income is pledged.

Appeal from the Circuit Court for Jackson county.

The facts of the case are stated in the opinion of the court.

J. F. McClellan for Appellant.

D. L. McKinnon for Appellees.

THE CHIEF JUSTICE delivered the opinion of the court.

This was a bill filed by appellees to foreclose a mortgage executed by appellant. The mortgage in terms conveys to appellees two lots in Marianna to secure a sum of money due and to be advanced.

The legal title of the property described in the mortgage stands as follows: "In 1866, it was purchased by George W. Robinson, as trustee, and conveyed unto the said George W. Robinson, trustee of the said Ann E. Wilson, and his successors in said trust, the above described lots or real estate, with all the improvements, rights, privileges and appurtenances thereunto belonging, to have and to hold said lots or real estate unto him, the said George W. Robinson, as trustee aforesaid and his successors in trust, in as full, complete and perfect right, title and interest, as the property bequeathed to the said Ann E. Wilson, under the will of her father, Jacob Robinson, and with the same powers and for the same uses and purposes therein expressed."

The provisions of the will referred to are as follows: "I

give and bequeath unto my brother, William H. Robinson, and my son Walter J. Robinson, one seventh part of my estate, both real and personal, but upon this special trust and confidence, and for the purposes hereinafter mentioned, that is to say, after my son Isaac becomes of age, to suffer and permit my daughter Ann E. Robinson to receive and use to her sole and separate use, free from the control or contracts of any husband or husbands she may hereafter have, the income and profits of the said estate for and during her natural life. * * * And it is my further will and desire that should my said daughter leave a child or children living at the time of her death, then and in that case, I give and bequeath said estate, real and personal, to the said child or children, their heirs and assigns forever. But if my said daughter should depart this life leaving no child or children, then and in that case, it is my will and desire that the said estate, in this item mentioned, go to and I do bequeath the same to my other children in equal proportions, share and share alike."

The testator died in 1840.

The daughter, Ann E. Robinson, now Wilson, appellant, has one daughter living.

After the death of the testator, George W. Robinson became of lawful age, and, by virtue of a further provision of the will, became a trustee of the said estate, and he is the trustee named in the deed.

Afterward, and before the commencement of this suit, George W. Robinson died, and after the commencement of suit Isaac C. Robinson was appointed trustee by the court, who also died intestate and there is no trustee acting. Since then, the defendant says, she has endeavored to have another trustee appointed, but has been unable to get any one to accept the office.

Appellant answered setting up the condition of the title and estate, and avers that she has, and had no other

interest in the mortgaged property than a right to the net annual income for life.

The bill was amended and complainants say they were not advised that appellant had only a life interest at the time the mortgage was executed; that the trustee was dead at the date of the mortgage; prays that a trustee may be appointed, if necessary, and made a party of the bill; that the interest of the defendant (appellee) in said property be sold to satisfy said debt, or that a receiver be appointed to take charge of the same and apply the rents and profits to the payment of plaintiff's claim until the same is satisfied; and in the event said property or interest of defendant, or rents and profits are not sufficient to satisfy said claim, that execution may issue against her for the balance due, and for such other relief, &c.

Appellant further answering, says that the property consists of town lots, on which is a dwelling-house, out-houses, and an office. That they need repairs and fencing, and an expenditure of three or four thousand dollars will be necessary to preserve them. She further insists that her said daughter is a necessary party to the suit, and that there should be a trustee appointed, and that no decree can be rendered without the presence of such parties.

The chancellor decreed that there was a sum due the complainants from the defendant under the mortgage, that it be paid, or in default "that the sheriff levy upon and sell the life interest of defendant" in and to the lots; that the defendant and all others claiming any portion of said life interest in and to said lots or any interest therein, by or through defendant, be foreclosed and barred of all equity of redemption, and in the case of a sale that the sheriff put the purchaser in possession.

No trustee was appointed.

Defendant appeals and insists:

1. That there is no equity in the bill.

2. All parties in interest were not before the court.

3. The court erred in decreeing a sale of the property.

4. Defendant had no interest which she could mortgage or convey, or which could be sold.

This appellant had no title to the lots in question, either in fee or for life or for years. The legal title was in the trustee, and she had no estate in reversion or remainder; that was in other persons mentioned in the will of her father. She had no estate *in the land* which she could convey or encumber by mortgage; her entire interest was in the income, or rents and profits.

A mortgage is a contract of sale executed with power to redeem, and must have all the properties and qualities incident to the validity of an absolute disposition. 1 Powell on Mortgages, chapter II.

Everything which may be considered as property, whether in the technical language of the law denominated real or personal property, may be the subject of a mortgage. Possibilities, also, being assignable, are mortgageable, a mortgage of them being only a conditional assignment. Rents and franchises, also, may be mortgaged. *Ib.*, pages 25, 26.

As to the kinds of property which may be mortgaged, it may be stated that, in equity, whatever property, personal or real, is capable of absolute sale, may be the subject of a mortgage. This is in conformity to the doctrine of the civil law. Therefore, rights in remainder and reversion, possibilities coupled with an interest, rents, franchises and choses in action, are capable of being mortgaged. Story's Eq. Jur., §1021; 4 Kent's Com., 144; 3 Stockton (N. J. Eq.) 542-3.

By the rule established by the authorities, Mrs. Wilson had an interest in the income, which was the subject of assignment, pledge or mortgage. By the terms of the mortgage she conveyed at least all her interest, and that interest, being only a right to the income of the property, it must be

held that the mortgage operated as an assignment or pledge of the income only to secure her debt. The property itself was vested in a trustee, who had the legal title and right of possession as against her and everybody else so long as the trust remained, subject only to her right, through the courts, to secure its proper and profitable management.

The complainants, then, are the qualified assignees of that income by virtue of the mortgage, and will stand in that relation until their debt is paid by Mrs. Wilson, or out of the income, or until her interest is otherwise terminated.

As has been remarked, Mrs. Wilson had no legal estate in the land, but in the rents and profits. If there was no income she got nothing. She could only have the protection of the court to secure a proper management of the property in order that an income might be produced. By the terms of the trust the property is subject to the personal management and custody of the trustee. Mrs. Wilson looks to him for the income. She could not by sale, pledge or assignment create any new or additional charge upon the property, or change its character or her attitude in respect to it. Her assignment, therefore, gave to the assignee no other interest or right than she possessed.

The decree, without appointing a trustee or receiver, directs a sale of the "life interest" of Mrs. Wilson in the lots described, and that the sheriff put the purchaser in possession. This life interest being merely a right to the income or net profits realized, is not such an estate as may properly be sold and conveyed, and the possession of which can be delivered to a purchaser.

The effect of the assignment here is to give to the "mortgagees" the right to subject the net income to the payment of their demand. See Edwards on Receivers, 2 Ed., 537.

The whole legal estate is vested in the trustee so long as any of the valid purposes of the trust continue. (1 Barb.

Ch. R., 329.) A trustee in whom is vested the legal estate is a necessary party in all proceedings affecting the estate, where there is a remainderman, for the trustee is liable for the proper care and preservation of the property. (Hill on Trustees, 384 *et seq.;* Tiffany and Bullard, 809, 815.) Here the custody and management of the property is directly involved. The court should take measures to secure the protection of the property for the benefit of those entitled to the remainder. Hill on Trustees, 385.

There is no trustee now in existence, according to the pleadings in this case; nor is it stated who is in possession, or that the property now yields an income.

The bill prays the appointment of a trustee, and the answer states that the appellant has endeavored to procure the appointment of a trustee; but that she has been unable to find any person willing to undertake the trust.

Upon a final decree the court can appoint a trustee, (King vs. Donelly, 5 Paige 46;) and if no proper person is found to take the trust, a receiver must be appointed who, under the direction of the court, will protect the rights of all persons interested in the estate. Kerr on Receivers, 24.

The court should appoint a trustee to take charge of the property, to secure its due protection and management, and direct him to apply the net income to the payment of the indebtedness of Mrs. Wilson, to secure which the mortgage or pledge was executed, until the same shall be paid, or until the indebtedness shall be otherwise satisfied or the trust terminated. If it shall be found impracticable to appoint a suitable person to be a trustee, a receiver should be appointed with the like powers and duties.

It is unnecessary to make the persons entitled to the remainder parties in this proceeding, as their interests are represented by the trustee or receiver, and they are under the protection of the court.

The decree, so far as it directs a "foreclosure" of all

equity of redemption, and a sale of the interest of Mrs. Wilson in the property, and a delivery of the property into the possession of the purchaser, is reversed, with costs of the appeal and proceedings in this court to be paid by the appellee. Cause remanded for further proceedings.

WESTCOTT, J., did not hear this case.

JOHN MCMAHON, APPELLANT, VS. TERESA A. RUSSELL, APPELLEE.

1. A mortgage, in this State, is a specific lien upon property, and is not, of itself, a conveyance of the legal title. The title is divested only by forfeiture of the conditions and a sale under the decree of the court.

2. The statute gives dower to the widow, "one-third part of the lands of which her husband died seized and possessed, or had before conveyed, whereof the widow had not relinquished her right of dower." R. and wife executed a mortgage to secure purchase money, and afterwards R., without his wife joining, executed another mortgage to secure a loan: *Held*, that the wife, by the first mortgage, relinquished her dower only as to this mortgagee and his assigns, and the money thereby secured, and was entitled to dower as against the second mortgage; and a foreclosure of the second mortgage and sale thereunder did not divest her of her dower rights.

3. Where a husband had mortgaged land, his wife not joining or relinquishing her right of dower, and this mortgage was foreclosed, and the land sold and conveyed under the decree of the court, and the husband afterwards dies, such mortgage and sale as are a "conveyance" by the husband within the contemplation of the statute giving dower in lands "before conveyed, whereof the wife had not relinquished her right of dower."

4. Where the husband and wife had executed a mortgage in which she had relinquished her right of dower, upon the death of the husband

the widow cannot maintain a suit against the mortgagee or his assigns who may be in possession in pursuance of a sale under a second mortgage given by the husband alone, unless she redeems by paying the amount due upon the mortgage in which she had relinquished her dower.

5. The purchaser under a second mortgage executed by the husband only, may pay off and take an assignment of a prior mortgage in which the wife had relinquished her dower, and hold the prior mortgage as a protection against a claim of dower until such prior mortgage shall be paid or the property redeemed therefrom.

Appeal from the Circuit Court for Jefferson county.

In January, 1867, Dr. James S. Russell, the husband of the appellee, purchased of A. Hopkins & Co. a tract of land in Jefferson county in this State, and received a deed therefor, and executed notes for the purchase money, and a mortgage on the land to secure the notes. The appellee joined in the execution of the mortgage, and relinquished dower in the lands.

In March, 1871, Dr. Russell borrowed $1,340, or about this sum, from W. R. Grantham, and executed a mortgage on the same lands to Grantham, to secure the payment thereof, but the appellee did not make any relinquishment of dower in the lands as to this mortgage. Payments were made on the Hopkins & Co. indebtedness sufficient to reduce it to $1,233.05, and the note on which this balance was due and the mortgage were transferred to Samuel Pasco, as Master in Chancery, he purchasing the same as an investment of funds held by him as such Master.

On the 12th of February, 1876, Grantham obtained a decree of foreclosure and sale on his mortgage, and the premises were sold on the first Monday in April, A. D., 1876, and the appellant, as Vice President of the Southern Bank of the State of Georgia, in which capacity his actions in the several matters herein are taken, became the purchaser and received a deed from the Master and went into possession.

Soon after the Master in Chancery, Pasco, filed a bill to foreclosure the A. Hopkins & Co. purchase-money note and mortgage held by him. Dr. Russell and his wife, the appellee, and the appellant, were made parties defendant, and on the 21st of June, 1876, a decree of foreclosure and sale was rendered therein.

On the 5th day of July, 1876, the appellant paid the holder of the last mentioned decree the amount due thereon and took a transfer thereof.

Dr. Russell died September 25, A. D., 1877, and on the 5th of April, 1878, the appellee, his widow, filed a bill in chancery against R. B. Whitfield as administrator of his estate, and the appellant, as Vice President aforesaid, praying that dower be allotted to her in the lands and of the rents and profits thereof, of which an account was prayed. A decree *pro confesso* was entered against the administrator, but the appellant answered setting up the facts stated above. At the fall term of the Jefferson Circuit Court, Judge Maxwell rendered a decree in favor of the appellee, granting her dower in the lands, also in the rents and profits, of which an account was decreed to be taken. From this decree the appeal is taken.

T. L. Clarke for Appellant.

Pasco and Palmer for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

The statute, (Thomp. Dig., 184, 185,) declares that the widow "shall be entitled to dower in the following manner, to-wit: one-third part of all the lands, tenements and hereditaments, of which her husband died, seized and possessed, or had before conveyed, whereof said widow had not relinquished her right of dower."

It is contended that the appellee was not entitled to dower

under the terms of the statute, because her husband did not die "seized and possessed" of the land in which she claims dower; and that he had not "before conveyed" said land, without her joining and relinquishing dower; but that he had given a second mortgage in which she did not relinquish her dower, (having relinquished it by the first, or purchase money mortgage) under which second mortgage, the same being foreclosed, the appellant was the purchaser and is in possession under the master's deed. (He is also the assignee of the purchase money mortgage, having purchased it after the sale under the second mortgage, to protect himself.)

By giving the second mortgage to secure a debt, he created a lien upon the land, which lien was enforced by the courts in the manner provided by law, and which resulted in a sale of his interest and a transfer of it to the purchaser.

Though the mortgage itself was not an absolute conveyance in law or in equity, it became absolute by the enforcement of its conditions. The mortgage became, therefore, by operation of the contract enforced by law, a conveyance *by* the mortgagor within the meaning of the statute relating to dower in lands which the husband "had before conveyed" without the wife's relinquishment of dower. If this is not the correct solution, if the giving of a mortgage by a husband which may ripen into a change of title by enforcing its provisions, is not a "conveyance" by him within the meaning of that statute, the necessary result is that the husband may alienate all his real property, (other than his homestead,) by executing a mortgage upon it and permitting it to be sold upon foreclosure proceedings, to the end that upon his death he is neither "seized and possessed," nor has he "before conveyed" his land, and the widow may get nothing, though she had relinquished nothing. Such a construction would make the statute a mere instrument for defrauding women of their legal and natural

rights of support and protection, for the securing of which, it is supposed, this law was created. This view cannot be sanctioned.

Again it is said that the wife having relinquished her dower by joining her husband in the first, or purchase-money mortgage, she had no remaining inchoate right of dower in the land when the second mortgage was executed by her husband.

Some of the early English and American decisions are cited to show that the relinquishment of the right of dower to the first mortgage extinguished it while the first mortgage remained, and it could not be revived without satisfaction of this mortgage; or, on the other hand, that as the mortgage was given to secure purchase money, while this remained unpaid she was never invested with a right of dower, inchoate or present.

The ancient rule of the English law was that a mortgage in fee carried the legal estate into the mortgage; and if the mortgage was executed by a husband before marriage, there was no estate remaining in him of which the wife could be endowed; and if the mortgage was executed after marriage by husband and wife, all the legal estate passed and a mere equity of redemption remained, of which the widow was not endowed. This was the rule as announced in Stelle vs. Carroll, 12 Peters, 201, and Mayburry vs. Brien, 15 *id.*, 21. In Stow vs. Tifft, 15 Johns. R., 458, it was held that by mortgage for purchase money the fee was re-invested in the mortgagee, *eo instanti*, and hence no dower attached, as there was no seizin in the husband; the authorities cited being the old English law. In Holbrook vs. Finney, 4 Mass., 566, it was held that a mortgage for purchase money re-invested the fee in the mortgagee. The mortgage was foreclosed, the wife not being a party, and dower was denied. So, also, in Clark vs. Munroe, 14 Mass., 351, which was decided upon the authority of Holbrook vs. Finney.

The cases of Popkin vs. Burnstead, 8 Mass., 491, and Bird vs. Gardner, 10 Mass., 364, cited by counsel for appellant, were governed by the same principle, and all of them hang upon the old English case of Nash vs. Preston, Cro. Car., 190, that where "the land was in and out" of the husband by one act, the deed and the re-conveyance by mortgage being one transaction, no estate in fee was vested in the husband, but only an equity of redemption, of which the widow was not dowable. For the mortgage was a re-conveyance of the fee, and the rule was the same if a mortgage was given for money loaned, for the mortgage vested the fee in the mortgagee.

This being the ancient rule of the common law, it is contended that the statute of Florida enacting the common law of England introduced the same rule. It was enacted by the Legislature, however, in 1853, (Chap. 525,) "that a mortgage is, and shall be held in our courts a specific lien upon property for a specific purpose, and, in point of fact as well as law, the mortgagee is incapable of acquiring possession until after decree of foreclosure" and lawful sale.

This statute enacted a principle that had already become the rule in most of the United States, with or without a similar statute, and both at law and in equity.

Under this act a mortgage cannot be a present conveyance of the legal title, however it may become so by breach of conditions and the action of the courts. The title is transferred in pursuance of the contract embraced in the mortgage by a judicial sale decree for the enforcement of the specific lien. The result of this statute is that the giving of a mortgage does not vest the legal estate in the mortgagee. The mortgagee has no title to the land which he can convey by deed and nothing which can be seized on execution against him; and the mortgagor remains, until a sale, seized in fee. This is the gist of the American doctrine as held in regard to the effect of a mortgage and the

status of the parties. 6 Johns. R., 290; 7 *id.*, 278; 2 Cowen, 195; 2 Pai., 68, 586, 592; 5 Wend., 603; 1 McCord Ch., 395, 397, 398; 7 Mass., 138; 9 *id.*, 101; 5 Pick., 146; 6 *id.*, 416; 15 Mass., 278; 15 Johns., 319; 19 Johns., 325; 20 N. Y., 412; 5 H. and J., Md., 315.

The necessary result of this doctrine, and of our statute, is that a mortgage by a husband and a release of dower by a wife to the mortgagee, does not divest the mortgagor of his title, nor does it affect the dower right of the wife *except as to the mortgage debt.*

Several strong cases are cited by counsel for appellant from the early Massachusetts reports tending to the result that a release of dower by joining in a mortgage was a complete divestment of the dower rights, and that hence the wife had no dower as against a second mortgage in which she did not join. But, upon this point, Parker, C. J., in Snow vs. Stevens, 15 Mass., says: In the cases cited, the doctrine goes no further than that the widow of him who was seized only of a right to redeem, should not have dower *against the mortgagee.* The interest of the widow in such estate is protected by the court of chancery. And Kent (4 Comm., 39,) says that dower cannot be claimed as *against the mortgage* for purchase money. Also, 2 Gill and J., 318; 4 Leigh, 30; 31 Me., 243; 45 Me., 493; 21 Ala., 504; 29 Ark., 591; 20 N. Y., 412; 44 Iowa, 651; 28 Wis., 266.

But she may have dower as against every one but the mortgagee and his assigns. Thomas vs. Hanson, 44 Iowa, 651; Mills vs. VanVoorhis, 20 N. Y., 412; Young vs. Tarbell, 37 Me., 509; McCabe vs. Bellows, 7 Gray, 148, and cases above cited.

In no recent case decided in this country have we found it announced that a release of dower to a mortgagee, whether for purchase money or money borrowed, operates as a bar of dower as against any subsequent lien. And it

would directly contravene the spirit of our statute of 1853, before referred to. It must, therefore, be held that the widow is entitled to her dower as against the second mortgage in which she did not join, and against the defendant as the purchaser upon the foreclosure of the second mortgage. The defendant is in possession under that sale. It is shown that the purchase of the property by defendant was made without reference to the first mortgage, and under the impression that it had been paid, or nearly paid. Finding that it was not satisfied, he paid the amount due upon it, and took an assignment of it for his protection. This he was entitled to do, and he is entitled to the advantage of it as a security for the amount due upon it. 72 Pa. St. R., 183; 8 Paige, 182; 7 Paige, 509; 16 Me., 146; 22 Me., 85; 7 Me., 377; *Ib.*, 102; 30 Vt., 530; 44 *Ib.*, 601, 640; 45 *Ib.*, 525; 8 Met., 517; Jones on Mort., §§866, 869; 8 Allen, 557; 4 Gray, 46.

The widow is entitled to dower in the land as against the mortgage she did not sign; but as against the mortgage for purchase money, in which she released her dower, she is not entitled, unless she first redeem it by paying it. She released her dower as to the money secured by that mortgage, and is not dowable while it remains unpaid; the assignee of this mortgage holding the legal title and being in possession. Bond vs. Fay, 8 Allen, 211; 12 Gray, 263; Jones on Mort., §866; 11 N. J. Eq. (3 Stockton), 133; 16 Ohio St., 193, 204, 205.

If the mortgage be redeemed by an heir, or by any one interested in the estate who is not bound to pay the debt, to avail herself of dower she must contribute her proportion of the charge according to the value of her interest. 7 Me., 102; 45 N. H., 490; 2 N. J. Eq., 349; 5 Pick., 146; 12 Gray, 363; 1 Paige, 193; 5 Johns. Ch., 482; 46 Mo., 510; 33 Mo., 337; 8 Met., 517; Jones on Mort., §866.

If any one claiming under husband redeems as heir, &c.,

she may repay her proportion of the amount so paid and have her dower in the whole estate; but if she herself redeems from the mortgagee, or from his assignee, she must pay the whole amount due on the mortgage, if the mortgagee or the assignee objects to the assignment of dower. 4 Cushing, 257; 5 Pick., 146; 2 *Ib.*, 519; 4 Gray, 46; 7 *Ib.*, 148; 3 Cushing, 554; 11 Allen, 39; 105 Mass., 119.

From the authorities, it seems to be the established doctrine that the widow cannot have dower as against the mortgage in which she expressly released it, and this is according to her express covenant, that her right of dower cannot be asserted as against the money due.

So much of the decree as awards dower against the assignee of the first or purchase money mortgage is reversed with costs against appellee, and the cause is remanded for further proceedings in accordance with the practice of the court and the equities of the case.

WESTCOTT, J., took no part in the decision of this case.

DECISIONS

OF THE

Supreme Court of Florida.

JUNE TERM, A. D. 1880

THE STATE OF FLORIDA, EX REL. CHARLES SCOTT, VS. THE BOARD OF COUNTY COMMISSIONERS OF JEFFERSON COUNTY.

1. A writ of mandamus, to compel a Board of County Commissioners to meet and fully perform a public duty required by law, may be issued on the relation of a private citizen when the board has neglected or refused so to meet and perform as required by law.

2. But such writ cannot be demanded by one citizen in behalf of another, or a number of others, to compel a Board of County Commissioners to grant a certificate, or certificates, to which such others may be entitled under the registration law of 1877. Such individual right must be prosecuted by each person entitled to the individual relief.

3. A Board of County Commissioners have no power to control the registration of voters by the clerk of the court, and have no power to place names upon the registration lists, except while the lists are

before them for revision, to restore names improperly or inadvertently erased.

4. The existence of circumstances indicating that members of the County Board do not intend to meet at a time, and for public purposes, as provided by law, will not authorize a mandamus before an actual omission of duty has occurred.

5. Application to the County Commissioners for a certificate for the purpose of having a name restored to the registration list, by a person whose name has been improperly struck from the list, and the granting of such certificate, and presenting the same to the clerk, is not the exclusive method of procuring the re-enrollment of such name. Every person having the legal qualifications of an elector is entitled to have his name entered upon the registration list by the clerk, upon taking the prescribed constitutional oath before the registration officer or clerk, even though his name has been improperly erased by the board. The clerk or registration officer has no judicial or other discretion to refuse registration when the oath is tendered.

6. The wrongful or improper erasure or omission of the name of a person who has been registered as a voter will not deprive him of the right to vote. He is entitled to vote on taking the oath prescribed in the 16th section of the election law, as amended by section 7 of the act of 1877, in cases where his name does not appear on the lisct. If his right to vote is challenged, he must also take the oath required of persons challenged.

7. The provision at the end of section 7 of the act of 1877, (amending section 16 of the act of 1868,) requiring the persons offering to vote to produce witnesses who are personally known to two members of the board of inspectors of election, &c., creates a court with peculiar powers, unauthorized by the Constitution, and is void.

(The above notes numbered 5, 6 and 7, are not necessary to the determination of this case, but express the opinion of a majority of the court construing statutes relating to the subject-matter of the controversy.)

The facts of the case are stated in the opinion of the court.

Alva A. Knight and *LeRoy D. Ball* for Relator.

T. L. Clarke and *Pasco & Palmer* for Respondents.

THE CHIEF JUSTICE delivered the opinion of the court.

The relator claiming that his own name and the names of a large number of persons heretofore duly registered as voters, and entitled to be registered as voters in his county, were improperly struck off and erased from the list by the County Commisisoners in 1877; that the commissioners are indisposed to meet and continue in session a sufficient length of time to afford to him, and such others, an opportunity to apply for a certificate entitling them to a reinstatement of their names upon the registration rolls, prays that the respondents may be required forthwith to meet and continue in session, from day to day, to hear applications for certificates entitling the relator and the citizens aforesaid to be re-enrolled upon the registration books according to the provisions of the law of 1877.

The respondents make return to the writ and say that the relator, before the issuing and service of the alternative writ, (his name having been struck off from the registration list,) applied to the Board of Commissioners of Jefferson county, they constituting such board, for a certificate to be presented to the clerk for the purpose of having his name restored to the list, and on making the declaration, on oath, before the board, they gave him the necessary certificate, whereupon the name of the relator was replaced upon the registration list, in pursuance of the act of 1877, and the number of his election district duly entered against his name. Wherefore, they say the relator has not now, nor had he at the time of the service of the alternative writ, any just cause of complaint against them.

They further answer, that in 1878 an alternative writ of mandamus was issued by the Judge of the Circuit Court against the Board of County Commissioners of Jefferson county, commanding them to restore to the list of registered voters the names of some fifty persons, including that

before them for revision, to restore names improperly or inadvertently erased.

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7. The provision at the end of section 7 of the act of 1877, (amending section 16 of the act of 1868,) requiring the persons offering to vote to produce witnesses who are personally known to two members of the board of inspectors of election, &c., creates a court with peculiar powers, unauthorized by the Constitution, and is void.

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This being the ancient rule of the common law, it is contended that the statute of Florida enacting the common law of England introduced the same rule. It was enacted by the Legislature, however, in 1853, (Chap. 525,) "that a mortgage is, and shall be held in our courts a specific lien upon property for a specific purpose, and, in point of fact as well as law, the mortgagee is incapable of acquiring possession until after decree of foreclosure" and lawful sale.

This statute enacted a principle that had already become the rule in most of the United States, with or without a similar statute, and both at law and in equity.

Under this act a mortgage cannot be a present conveyance of the legal title, however it may become so by breach of conditions and the action of the courts. The title is transferred in pursuance of the contract embraced in the mortgage by a judicial sale decree for the enforcement of the specific lien. The result of this statute is that the giving of a mortgage does not vest the legal estate in the mortgagee. The mortgagee has no title to the land which he can convey by deed and nothing which can be seized on execution against him; and the mortgagor remains, until a sale, seized in fee. This is the gist of the American doctrine as held in regard to the effect of a mortgage and the

before them for revision, to restore names improperly or inadvertently erased.

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The respondents make return to the writ and say that the relator, before the issuing and service of the alternative writ, (his name having been struck off from the registration list,) applied to the Board of Commissioners of Jefferson county, they constituting such board, for a certificate to be presented to the clerk for the purpose of having his name restored to the list, and on making the declaration, on oath, before the board, they gave him the necessary certificate, whereupon the name of the relator was replaced upon the registration list, in pursuance of the act of 1877, and the number of his election district duly entered against his name. Wherefore, they say the relator has not now, nor had he at the time of the service of the alternative writ, any just cause of complaint against them.

They further answer, that in 1878 an alternative writ of mandamus was issued by the Judge of the Circuit Court against the Board of County Commissioners of Jefferson county, commanding them to restore to the list of registered voters the names of some fifty persons, including that

she may repay her proportion of the amount so paid and have her dower in the whole estate; but if she herself redeems from the mortgagee, or from his assignee, she must pay the whole amount due on the mortgage, if the mortgagee or the assignee objects to the assignment of dower. 4 Cushing, 257; 5 Pick., 146; 2 *Ib.*, 519; 4 Gray, 46; 7 *Ib.*, 148; 3 Cushing, 554; 11 Allen, 39; 105 Mass., 119.

From the authorities, it seems to be the established doctrine that the widow cannot have dower as against the mortgage in which she expressly released it, and this is according to her express covenant, that her right of dower cannot be asserted as against the money due.

So much of the decree as awards dower against the assignee of the first or purchase money mortgage is reversed with costs against appellee, and the cause is remanded for further proceedings in accordance with the practice of the court and the equities of the case.

WESTCOTT, J., took no part in the decision of this case.

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of the relator, and also the names of about two thousand other persons, not designated by name, or show cause, &c.; that on the return of said writ respondents moved to dismiss it because it required them to restore a large number of persons, whose names were not given, and they were unable to designate them, and therefore could not make proper return or comply with the command of the writ in that respect; that the writ was defective in that it joined in one case a number of persons whose rights were separate and distinct, involving different and distinct issues; that upon the hearing of said motion the judge gave his decision and rendered judgment granting the motion, quashing the writ, and dismissing the proceedings, which judgment has not been apealed from, reversed or set aside; wherefore, they insist that all the matters complained of have been already adjudicated in a proceeding to which the relator was a party. All which the respondents set up as a sufficient return to the prseent writ of mandamus, and pray judgment, &c.

The matter coming on to be heard upon the alternative writ and the return, counsel for relator moves the court that a peremptory writ be granted. This motion is treated as a demurrer to the return of the respondents.

We first remark, as to the plea of *res adjudicata*, that the return does not show that this relator was a petitioner or actor in the proceedings before the Circuit Judge, notwithstanding his name appears in the body of the writ; and also that the alternative writ issued by the judge was dismissed without adjudicating the rights of this relator, or other persons therein named. For either or both of these reasons the judgment of the Circuit Judge was not a bar to these proceedings.

As to that part of the return which alleges that the name of the relator had been duly restored to the registration list before the service of the alternative writ, it is a complete

THE CHIEF JUSTICE delivered the opinion of the court.

The relator claiming that his own name and the names of a large number of persons heretofore duly registered as voters, and entitled to be registered as voters in his county, were improperly struck off and erased from the list by the County Commisisoners in 1877; that the commissioners are indisposed to meet and continue in session a sufficient length of time to afford to him, and such others, an opportunity to apply for a certificate entitling them to a reinstatement of their names upon the registration rolls, prays that the respondents may be required forthwith to meet and continue in session, from day to day, to hear applications for certificates entitling the relator and the citizens aforesaid to be re-enrolled upon the registration books according to the provisions of the law of 1877.

The respondents make return to the writ and say that the relator, before the issuing and service of the alternative writ, (his name having been struck off from the registration list,) applied to the Board of Commissioners of Jefferson county, they constituting such board, for a certificate to be presented to the clerk for the purpose of having his name restored to the list, and on making the declaration, on oath, before the board, they gave him the necessary certificate, whereupon the name of the relator was replaced upon the registration list, in pursuance of the act of 1877, and the number of his election district duly entered against his name. Wherefore, they say the relator has not now, nor had he at the time of the service of the alternative writ, any just cause of complaint against them.

They further answer, that in 1878 an alternative writ of mandamus was issued by the Judge of the Circuit Court against the Board of County Commissioners of Jefferson county, commanding them to restore to the list of registered voters the names of some fifty persons, including that

of the relator, and also the names of about two thousand other persons, not designated by name, or show cause, &c.; that on the return of said writ respondents moved to dismiss it because it required them to restore a large number of persons, whose names were not given, and they were unable to designate them, and therefore could not make proper return or comply with the command of the writ in that respect; that the writ was defective in that it joined in one case a number of persons whose rights were separate and distinct, involving different and distinct issues; that upon the hearing of said motion the judge gave his decision and rendered judgment granting the motion, quashing the writ, and dismissing the proceedings, which judgment has not been apealed from, reversed or set aside; wherefore, they insist that all the matters complained of have been already adjudicated in a proceeding to which the relator was a party. All which the respondents set up as a sufficient return to the prseent writ of mandamus, and pray judgment, &c.

The matter coming on to be heard upon the alternative writ and the return, counsel for relator moves the court that a peremptory writ be granted. This motion is treated as a demurrer to the return of the respondents.

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As to that part of the return which alleges that the name of the relator had been duly restored to the registration list before the service of the alternative writ, it is a complete

answer so far as the relator's individual demand of registration is concerned.

The motion for a peremptory writ notwithstanding the answer, involves the sufficiency of the alternative writ as upon demurrer.

The further grounds of objection to the prayer of the alternative writ are: "The right of any person to have his name replaced that has been improperly erased is a *private* right, and neither the public at large, nor the relator, have such an interest in the restoration of the names, alleged to have been improperly erased, as will entitle the relator to the peremptory writ.

"The statute affords a remedy—plain, adequate and complete—to any person whose name has been improperly erased, which should be pursued.

"It is not the duty of respondents to replace names improperly erased, and no statute gives them such power or authority.

"It is not alleged that any person, whose name has been erased, has ever at any time made his declaration under oath, required by the statute, before the respondents, and been refused a certificate that would entitle him to have his name replaced."

It is assumed that this writ will lie upon the petition of the relator to compel the respondents to perform what is prayed as to their meeting and remaining in session so as to give greater opportunity to others to obtain the required certificates, if it should appear that the parties desiring relief have been practically denied it by the action of the Board of County Commissioners. Their duty, under the law in question, (laws of 1877, chapter 3021, sec. 1,) is to meet at a time named to purge the registration list by striking off the names of persons who, within their knowledge or according to certain reliable information, have died or become disqualified to vote. Of course they have no right to

strike off any other names, but should obtain information of residence, &c., so as to locate the voters in their proper districts. A few mistakes may be inevitable, and the duty of the board is to give sufficient opportunity to correct them. When application is made by citizens and the Board refuse to hear them, or when the proper oath is made or tendered, and the board refuse or neglect to give the certificate, they are amenable to the writ of mandamus, at the suit of the aggrieved parties severally, to compel the performance of their duty. If they have not so neglected or refused, the law will not take hold of them.

We find in this alternative writ no allegation that any of the persons included in the writ, or described therein, have not had opportunity to apply to the board, or that any of them have applied and been refused anything demanded. It is alleged that a large number of names—a thousand or more—were improperly erased in 1877; and now, in 1880, without showing that they have applied to be restored and have been refused, the petitioner prays this writ to compel the board to give the opportunity. The board is not authorized, by statute or by Constitution, to place names upon the registration list, and the courts cannot compel them to do so. The power of the board is derived from the statute alone. No neglect or omission being properly charged against the respondents, they are not liable in this proceeding.

It is said in the alternate writ that "at their meeting in October, 1868, for the purpose of restoring names improperly stricken off, the board so conducted themselves and so exercised their power, and assumed and pretended power under the statute by holding short sessions of their board by refusing to remain in session from day to day till the duty was performed, by formalities in conducting business by failure of a quorum of said board to attend, and various other ways, that it was impossible, prior to said

general election, for but comparatively few persons, whose names had been so erased from said book, to have their names restored thereto by the method of obtaining a certificate as aforesaid." This is a very serious charge, involving corrupt conduct and violation of the law on the part of members of the board; and, if any persons entitled to relief were denied it by direct or indirect action of the board, there is certainly virtue enough in courts and juries and prosecuting officers in Jefferson county to punish them. But the charge fails to show *who* was denied a hearing, or that any person was denied it. That "comparatively few," whose names had been erased, were able to have them restored may be true; but it is not alleged that any others than the few made the attempt, or that any were denied a hearing on application. Relator says that if respondents are compelled to meet for the purpose, about fifteen hundred such persons will promptly appear for the purpose of being restored to the lists and located in conformity to the statute. It is not alleged that the board has refused to meet at the request of any person to consider such application. The general allegation, that the board has shown a disinclination so to meet, no actual refusal to act in any case being charged, is not enough to warrant extraordinary proceedings against them.

Mandamus is never granted in anticipation of a supopsed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. It is therefore incumbent on the relator to show an actual omission on the part of the respondents to perform the required act; and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time. No threats or predetermination can be considered tantamount to a default or

omission of duty. High on Ex. Remedies, §12, and authorities cited.

But has this relator such a standing that he is entitled to the writ in behalf of other persons named or not named in the alternative writ?

An examination of all the books on mandamus, and all the cases decided that are accessible, brings us to the conclusion that the rule, as laid down in The People vs. Halsey, 37 N. Y., 344, is the law in such cases. Fullerton, J., speaking the unanimous voice of the Court of Appeals, says: "The writ of mandamus may, in a proper case, and in the absence of an adequate remedy by action, issue on the relation of a private individual, to redress a wrong personal to himself, or, on the relation of one who, in common with all other citizens, is interested in having some act done, of a general public nature, devolving as a duty upon a public officer or body who refuses to perform it." * * * "Inasmuch as the people themselves are the plaintiff in a proceeding by mandamus, it is not of vital importance who the relator should be so long as he does not officiously intermeddle in a matter with which he has no concern." And the Supreme Court of Nevada, (11 Nev., 223,) after reviewing the leading American cases, comes to the conclusion that "when the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the relator is not required to show that he has any legal or special interest in the result, it being sufficient if he shows that he is interested, as a citizen, in having the laws executed."

Most of the cases examined, in which these rules are applied, relate to the assessment and collection of taxes, opening roads, constructing bridges, canvassing of votes, and the like matters of public concern, in which the whole community is interested in having the laws enforced by public officers who have neglected or refused to perform a

duty required by law. We have no doubt that in case the County Commissioners *refuse to meet* to perform their duties in respect to the subject of hearing applications and issuing the necessary certificates to enable people so entitled to have their names restored, when improperly erased from the registration lists, or if they perversely or designedly refuse or neglect to hold and continue their meeting when citizens claiming are, by such refusal, denied the right; or do any act which hinders, obstructs, or prevents all citizens from obtaining their right, it is not only the right but the duty of any citizen, interested in the due performance of such duties and the execution of the laws, to demand that the laws be executed by the officers. The violation of such duties and the refusal to execute such laws affect the interests of every citizen and confer the right to demand that the proper remedy shall be applied. Each individual may also demand the writ of mandamus for the purpose of securing his own right when it has been practically denied by the action of the board.

A thousand writs of mandamus, in as many cases of private grievance, with all the attending costs and expenses, might be a frightful thing to contemplate; nevertheless, a thousand persons wronged may each have his separate remedy, if his right is denied, at the cost of the wrong-doers.

From the views above expressed it follows that the relator has not presented such a case as entitles him to this writ.

This will dispose of the present case, but I think it may be well to examine some features of the Constitution and the registration act in reference to their effect upon public and private rights, and as applicable to the status of the parties in whose behalf this writ was prayed.

While parties may have their remedies by mandamus to enforce their right to registration, after their names have been *wrongfully* stricken off, it is proper to say, further, in

reference to the action of a county board under the act of 1877, that by the striking off of the name of a person once registered and having had a right to vote, his *right* to vote cannot be lawfully impaired.

The act of 1877 must not be construed so as to deprive a legal voter of his privilege and right to vote in the district where he could vote if his name was on the roll and he was qualified in other respects. No man can be deprived of such rights but by his own act, or by due process of law. The Constitution of Florida declares expressly that every man having the necessary qualifications of citizenship, age and residence, (except persons under guardianship, &c., and such as may be excluded for crime of which he may have been convicted,) "shall be deemed a qualified elector at all elections under this Constitution," having at the time of his registration, taken and susbcribed the oath prescribed in Sec. I, Art. XIV.

The 6th section requires the Legislature at its first session to "provide for the registration by the Clerk or the Circuit Court of all the legally qualified voters in each county, and for the return of elections; and that after the completion, from time to time, of such registration, no person not duly registered according to law, shall be allowed to vote."

The Legislature in 1868, substantially complied with this requirement. (Chap. 1625, sections 6, 7, 8.)

Chapter 3021, laws 1877, amended section 9 of the act of 1868, by providing for the division of each county into election districts, and required the County Commissioners in September, 1877, and annually on the first Monday in October, to revise the registration list in the clerk's office and "erase therefrom the names of such persons as are known or may be shown to the satisfaction of the commissioners to have died or ceased to reside permanently in the county who are otherwise disqualified to vote." This revision

to be completed by the second Monday in October, and a list of the names erased to be published.

It is also provided that if any person, whose name shall have been improperly erased, shall declare on oath that he is a citizen, &c., showing that he is a qualified voter, and shall also describe and designate his place of residence in such county, the County Commissioners shall certify the facts so sworn to, and the clerk on production of the certificate by the voter, shall replace his name on the list of registered voters, with the date and location.

It is also made the duty of the County Commissioners to hold a special meeting on the third Monday of October, prior to every election, for the purpose of hearing complaints of persons who may claim that their names have been improperly erased from the list.

The seventh section of the act is amended by providing, among other things, that the clerk shall appoint a deputy for purposes of registration in each election district, except where his office is located, and give notice of the place appointed for registration. It is made the deputy of the clerk and deputy in each district, on application by an elector for registration, to administer to him the oath prescribed by the Constitution; and the clerk is forbidden to "register any person who fails to *show satisfactorily,* under oath if deemed necessary, (administered by such deputy clerk or registration officer,) that he resides in the election district in which he seeks to be registered; that he is twenty-one years of age," and that he has all the qualifications of citizenship and residence to be a voter.

The sixteenth section prescribes the oath to be taken by persons whose right to vote shall be challenged at the polls, which requires him to swear that he possesses the qualifications of a voter, and to the place of his residence, and that he has not before voted at that election.

And it further provides that if the name of the person,

who has been duly registered, shall not appear on the registration list of the district, he shall be required to state under oath that he is of lawful age, his residence in the State and county; "that he was duly registered at least ten days before the election, and that he has not changed his place of residence to any district other than the one in which he was living when he registered; or if he has changed his place of residence since such registration that he notified the Clerk of the Circuit Court of the fact of such change in accordance with the requirements of the first section of this act. He shall also be required to produce two qualified electors of the election district in which he offers to vote, who shall be personally known to at least two of the inspectors, and who shall each declare under oath, that such person does live in the election district in which he offers to vote, and has resided to their knowledge in Florida one year and in the county six months next preceding the election, whereupon the vote of such person shall be received."

I shall not question here and now the right of the Legislature to prescribe, that before being registered as a voter a person shall be required to show by his oath that he possesses the necessary qualifications, and that he is entitled to take the constitutional registration oath, and to be registered. Nor do I here question the legislative power to provide, that when the name of a person has been wrongfully erased from the list by the County Commissioners he may have his name re-enrolled by procuring the certificate of the commissioners, that he has sworn before them that he is a qualified person, and stating where he resides, and delivering the same to the clerk. The person desiring to have his name re-entered may pursue this course if it is most convenient to him. In such case I see no object, other than convenience, in going before the county board. They merely administer an oath and certify that he has so sworn, nothing more. They make no order in the matter, and it

would seem to be a mere superfluous ceremony. The oath taken before the clerk, who alone is authorized under the Constitution to register voters, would have been more convenient. The commissioners, for various reasons, may be better qualified to know what names ought to be struck off by reason of death, change of residence, or other disabilities, and have superior facilities for learning these facts by proper inquiry, but they have no power to place names upon the rolls unless to correct their own errors while the rolls are before them.

But this is not the only method by which the name of a person "improperly" struck from the registration list may be again registered. He has lost no rights as a citizen by the "improper" action of the county board in wrongfully erasing his name. He has the same right to be registered as a voter as any other person, and should not be subjected to any greater inconvenience. Any discrimination in a statute, by which one man having equal right with another shall be subjected to greater hardships than another to obtain the same status or rights as a citizen is void. Any citizen whose name is not upon the rolls may be registered upon taking the same oath that is required of others, even if his name has been "improperly" struck off; and the registering officer who shall refuse him registration in such case will be guilty of a wrong. The clerk or registering officer has no right to refuse registration to *any qualified citizen* under the Constitution and the statutes. If the charge in the alternative writ, that the Clerk of the Circuit Court of Jackson county instructed his deputies not to register the name of any person whose name had been erased; and also, that the clerk so refused to register such person, is true, it must have proceeded from a misapprehension on the part of the clerk. Such action would not only in effect tend to disfranchise those whose names had been wrongfully erased, but also those who may have ac-

quired the right to be registered after having been properly struck off, as in the case of one who had gone to reside elsewhere, thus losing his right to vote, and afterward returned and acquired the right anew.

Now as to that portion of the seventh section as amended by the act of 1877, section 2, which says that "under no circumstances shall any such deputy clerk or registration officer register any person who fails to *show satisfactorily, under oath, if deemed necessary,* (administered by such deputy clerk or registration officer,) that he resides in the election district in which he seeks to be registered; that he is twenty-one years of age," and that he is a citizen and a resident, &c. This language is not to be construed to confer upon the registering officer any discretion or judicial power to determine the right. If a man offers to make oath to his qualifications the oath should be administered; and if he swears that he possesses the necessary qualifications and residence the duty of the officer is to register his name. He cannot say that he is not "satisfied" with the evidence and reject it, for that involves judicial action. If the man is not entitled to vote he may be punished for illegally voting, by a tribunal qualified to ascertain and adjudicate the law and facts. The registration officer is not such a tribunal.

The sixteenth section, amended by section 7, act of 1877, relating to an offer at the polls to vote by a person whose name is not on the registration list of the district, requires him to make oath as to his age and residence; that he has not changed his residence since he registered, or if he has so changed his residence that he has notified the clerk of the change. "He shall also be required to *produce two qualified electors* of the district in which he offers to vote, who shall be *personally known* to at least two of the inspectors, and who shall each declare under oath that such person does live in the election district in which he offers to

vote, and has resided, to their knowledge, in Florida one year and in the county six months, next preceding the election, whereupon the vote of such person shall be received."

So far as this section proposes to organize a court to try a person's right to vote, composed of members, not judicial officers, who are *personally acquainted* with the witnesses, giving the applicant no means of obtaining witnesses, or of compelling the inspectors to acknowledge their personal acquaintance with the witnesses, and in effect giving the inspectors a discretion to receive or reject his vote, as they may be inclined, to this extent the last paragraph of the section is void. If one has been registered and is a voter, and has not lost his qualifiactions as such voter by his own act, the erasure or omission of his name from the list will not affect his right; and on taking the oath that he was duly registered, and has the legal qualifications to entitle him to vote, his vote must be received without subjecting him to the ordeal of a trial by a court. the members of which are, by this law, to decide the case upon their own knowledge and in their discretion. Such a tribunal is not recognized but prohibited by the fundamental law.

These suggestions are not pertinent to the application for a mandamus, but the petition and the alternative writ present a condition of affairs justifying an examination of the statute under which this controversy arose, and which, as is well known, has given rise to much perplexity and confusion. It is deemed better thus to announce an opinion upon these features of this statute than to wait the occurrence of serious and complicated controversies which may arise, involving perhaps the personal liberty or the property and rights of citizens, and which should be avoided.

The motion for a peremptory writ of mandamus is denied. The alternative writ must be dismissed.

MR. JUSTICE WESTCOTT delivered the following opinion:

I agree with the conclusion reached that the County Commissioners may, at the suit of a citizen, be compelled to perform a public duty affecting the citizens of the county, under certain circumstances *not disclosed by this alternative writ,* and for this reason the writ should be denied. While I think that "the right to a free ballot is the right preservative of all rights," yet, as I do not think this case involves the constitutional and other questions discussed, I say nothing of them. 2 Brock., 447; 6 New York, 177; 4 Barb., 56; 29 Alabama, 573; Cool. Con. Lim., 163; 17 Florida, 434.

THE STATE EX REL. HENRY PROSEUS, APPELLANT, VS. D. ISAAC CRAFT, APPELLEE.

A writ of mandamus will not lie to compel a sheriff to levy on property the title to which is in the name of the wife of a defendant is execution, the plaintiff claiming that the property is in equity that of the defendant, and demanding of the sheriff that he levy upon it as the property of defendant. The plaintiff has other adequate remedies, both at law and in equity.

Appeal from the Circuit Court for Hillsborough county.

The facts of the case are stated in the opinion of the court.

James T. Magbee for Appellant.

J. B. Wall and *S. M.* and *G. B. Sparkman* for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

An alternative writ of mandamus was issued upon the petition of Henry Proseus, by the Judge of the Sixth Circuit, requiring the appellee, the sheriff of Hillsborough county, to levy an execution issued in favor of relator aginst the property of one Kennedy upon a decree rendered. Relator pointed out certain real estate as the property of Kennedy, and demanded of the sheriff that he levy upon and sell it. The sheriff declined on the ground that the property was recorded in the name of Kennedy's wife. Respondent moved to dismiss the alternative writ, and the motion was granted and judgment rendered for costs against the relator, who appeals.

While it is true that in a great variety of cases a writ of mandamus will lie aginst ministerial officers to compel the performance of a clear legal duty, it is also a well established rule that the relator must be clearly entitled to the remedy sought by the writ . High on Ex. Rem., §10 and authorities cited.

In the present case the thing required of the sheriff is, that he levy and sell real estate, the legal title to which is held in the name of the wife of the defendant in execution. The plaintiff, who is the relator, here pointed out the property and requested the sheriff to levy, asserting that the title is held by the wife, though in fact and in equity it belongs to the husband. The plaintiff has not a clear, legal right to subject the property to sale for the debts of the husband, because the legal title is not in the husband. The presumption of law upon this fact is that the property is in law and in equity the separate property or estate of the wife. A wife, in this State, may hold real and personal property not subject to the debts of the husband.

Upon the return of an execution unsatisfied, the plaintiff

by a creditor's bill or other appropriate proceeding may establish the liability of such property to pay the husband's debt, and a decree to that effect would remove any doubt. Until then, however, the plaintiff has not a clear, legal right to subject the property, and the sheriff may not be compelled to levy upon it. The question, whether property held by the wife is liable for debts of the husband, cannot be tried in a proceeding by mandamus. The inquiry is incompatible with the nature of this process.

Again, the proceeding by mandamus can only be restored to where there is no other adequate legal remedy to accomplish the purpose. The plaintiff wants to make his money; he has nothing else in view. If a sheriff refuses to execute the writ, when it is his duty to execute it, the plaintiff may have his action at law aginst the sheriff.

We have not found any case decided by the courts, allowing a mandamus to compel a sheriff to make a levy under an execution in his hands. The court has such control over its officer, and the plaintiff has such right of action for willful neglect of duty, that it seems hardly possible that a mandamus should be resorted to, though *Moses* on Mandamus, page 60, suggests that such writ may lie when other remedies prove to be inadequate. But that point has not been reached in this case.

The judgment of the Circuit Court is affirmed with costs.

MAY'S EXECUTORS AND EXECUTRIX, APPELLANTS, VS. STEPHEN SEYMOUR, APPELLEE.

1. Where a person who cannot read or write is induced to make "his mark" to a writing, which is not read to him, and its contents not fully stated to him, and it is evident that he did not intend to consent to its tenor and effect, and he takes no benefit from it and does not ratify it, such writing cannot be held to be his voluntary agreement. In dealing with such a person it is incumbent upon the other contracting party to show, past doubt, that he fully understood the object and import of the writing, in order to charge him upon it.

2. When the verdict of a jury accords with the law and the facts of the case, a judgment will not be reversed on account of an erroneous charge to the jury, or a refusal to give instructions which may be appropriate, especially when a correct charge should produce the same result upon the facts.

Appeal from the Circuit Court for Jefferson county.

The facts of the case are stated in the opinion of the court.

Pasco & Palmer for Appellants.

T. L. Clarke for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

This was a proceeding under the act of 1868 relating to the unlawful detention of lands.

The complaint is that Stephen Seymour unlawfully withholds the possession of certain real estate, described as follows: a certain dwelling-house, formerly used as a schoolhouse, with the outbuildings near by, standing west of the public road running from the St. Augustine road in the direction of Drifton; also, the land adjoining thereto, which is occupied by him, containing by estimate five acres of

land, with the appurtenances, lying and being in the county of Jefferson.

To maintain the proceeding plaintiffs offered in evidence an agreement in writing, under seal, dated January 1, 1877, signed by Asa May (since deceased) of the first part and Stephen Seymour of the second part, to the effect that the party of the first part "agrees to rent to the party of the second part twenty-five acres of land and houses for the said party of the second part to live in during the present year; and the said party of the second part agrees to pay as rent for the said land and houses one bale of lint cotton," &c. This was signed by Asa May and by Seymour by making his mark.

This paper was objected to as evidence because it did not describe the premises, but only a quantity of land. The court received the paper subject to the condition that the premises should be identified with those mentioned in the complaint by parol evidence. Testimony was introduced tending to show that the land referred to in the lease was the same land upon which the defendant then resided, a part of which, with the house he occupied, is the five acres sought to be recovered. It was further shown by testimony of both parties, that defendant had resided on the same place over ten years; that he claimed to have bought it and paid Alvin May for it, and that Asa May had never been in possession. It appears by the testimony on both sides that the defendant could not write his own name; that he did not and could not read the lease, and it was not read to him, and he did not know what it contained when he signed it.

Defendant testified that he bought the place from Alvin May ten or eleven years ago, and paid him for it, and went into possession, and has been living there ever since; that after Mr. Alvin May had been "sold out," and Asa May bought his property, the latter claimed that he bought this

land in controversy, and wanted defendant to give it up to him or pay rent, but defendant refused. May often mentioned the matter, and "kept after him about it," and wanted him to sign a paper agreeing to pay rent. Defendant finally told Mr. May that if he, May, owned the land he would pay rent, but would not pay until it was decided. Shortly afterwards, Edwards, May's agent, came and wanted him to sign a paper, which he said was a "paper for the rent." He then told Edwards that the land was in controversy between him and May, and if it was May's land he was willing to pay rent, but that if it was his he would not pay any rent, and with this understanding he signed the paper. Toward the close of the year Mr. May came or sent to him to pay the rent, which he refused, and told him the cotton was gathered and housed on the place, but defendant refused to turn it out. May took no steps to collect the rent. Defendant afterwards ginned the cotton and sold it. Never surrendered the possession of any part of the land to May, who sowed oats there without his consent.

Plaintiffs' counsel asked the court to charge the jury, that "if the jury find that the defendant was ignorant of the legal effect of the lease entered into by him, that ignorance does not excuse him, and he is bound by the lease, but if he was induced to enter into the lease by any fraud or deceit of the plaintiffs' testator, then the lease is not binding upon him." This instruction was refused, and the court charged "that if the jury believed from the evidence that the defendant did not know that by signing the paper read in evidence he was acknowledging the title of complainant to the land in question, and that he never intended by signing said paper to acknowledge the title of Mr. May, then said paper does not bind him to the extent of such acknowledgment." To this the counsel of the plaintiffs expected.

The jury found for the defendant, and a motion for a

new trial being denied, and judgment having been entered thereon, plaintiffs appealed.

The errors assigned are that the court erroneously charged the jury as to the question of title being involved; that the court erred in refusing the instructions asked for by plaintiffs; that ignorance of the defendant as to the contents of the lease does not discharge him from its obligations, in the absence of fraud or deceit, or other unfair conduct on the part of lessor, and the ruling of the court misled the jury.

The jury did not find that the land described in the complaint had been taken possession of, or that the possession was held under the provisions of the lease.

The defendant is shown to be an ignorant and illiterate person. He could neither read nor write; did not and could not read the lease; was not informed what it contained; it was not read to him, and he did not know its contents, but was induced, after being much importuned, to make his mark to it. He claimed, from first to last, that he had bought and paid for the land, had been in possession for over ten years cultivating it, and it was the home of himself and his family; and this he testified to, and this was not contradicted. The complainants' testator claimed also to have bought the land when Alvin May was "sold out," and under this claim set about getting possession and ousting the defendant. This was effected so far as to obtain "his mark" to the writing, as appears in the testimony. Why was not the "land and houses" designated in the paper as the place where the defendant then lived? Was it presumed that he might have intelligence enough to ask for the reading of it, and that he might, in that event, refuse to surrender the property he claimed to have purchased and paid for, and claimed to own as against Asa May? And did the jury believe that the defendant had knowingly signed a paper, by the terms of which he would surrender his rights as a purchaser in possession, and acknowledge

and recognize a landlord whose superior right he persistently denied? Did the defendant act with that prudence and caution which would have been exercised by one capable of judging of the effect of his acts?

In this posture of affairs and this condition of the parties, with all this evidence before the jury, we are not inclined to disturb a verdict of a jury declaring the lease null, in that it is not the voluntary act of the defendant. In the language of Chief Justice Parker, in Dwight vs. Pomeroy, 17 Mass., 326, "Ignorance will be protected, if any advantage shall be taken of it by superior cunning or sagacity, * * * by the rules of law, as they now stand."

That this defendant, according to this testimony, knowingly placed it in the power of the lessor to dispossess him, and voluntarily surrendered his right to defend his possession or his title, if he had any, cannot reasonably be pretended. He obtained no benefit whatever from the lease, and has never ratified it.

As to the error alleged, that the court refused to instruct the jury, as requested, that the defendant's ignorance of the legal effect of the lease did not relieve him from such effect unless he was induced to enter into it by fraud or deceit of the testator, the general proposition may be correct, (and would be applicable to one phase of the case if coupled with the further proposition that it should be shown that the defendant knew the terms of the writing,) still, the instruction, as prayed for, if given could not have properly produced any other verdict upon the evidence.

As to the charge of the court, to which exception was taken, "that if the jury believe from the evidence that the defendant did not know that by signing the paper read in evidence he was acknowledging the *title* of the complainant to the land in question, and that he never intended by signing said paper to acknowledge the title of Mr. May, then said paper does not bind him to the extent of such

acknowledgment;" while technically incorrect, in that it gave the jury to understand that the defendant was not bound by the legal *effect* of his agreement, unless he actually knew such legal effect; and, also, in that it suggested to the jury that the *title* of May was acknowledged by the signing of the paper; yet the charge, if made more accurate, to-wit: if the jury had been instructed that if the evidence had shown that the defendant did not know the terms of the agreement, or had been induced through his ignorance and the sagacity of May's agents to sign the paper without being informed of its contents, he was not bound by its terms or their legal effect, the verdict would undoubtedly have been for the defendant.

There having been no legitimate proof that the defendant occupied this land under the lease, or that he had knowingly acknowledged the complainant's right of possession, the complainant was not entitled to a verdict under any instruction that should have been given. We think the verdict was in accordance with the law and the facts, and in such case it should not be disturbed, although there may have been an abstract error in the charge. See McKay vs. Lane, 5 Fla., 268; Proctor vs. Hart, *Ib.*, 465; Doggett vs. Willey, 6 Fla., 482; Prescott vs. Johnson, 8 Fla., 391.

The judgment is affirmed.

The preceding opinion was rendered at the January term, A. D. 1880, and at the same term the appellants filed a petition for a rehearing, which was not disposed of till the present term.

The petition is as follows:

The respectful petition of the appellants shows to the court the following matters, with their prayer for a rehearing of the cause:

The executors of the estate of Asa May instituted this action in the Circuit Court of Jefferson county, under the

statute of 1868, against Stephen Seymour, to recover possession of five acres of land or thereabouts, which they claimed he unlawfully withheld from them.

This land was a part of twenty-five acres rented from their testator in his lifetime, and before his death all of the land had been restored to his actual possession but the five acres sued for. Seymour refused to give this part up to the executors of Asa May, who died soon after the close of the year for which Seymour had leased the land from him. It came out incidentally in the testimony that Seymour had been in possession of the land for some years while Alvin May held the plantation of which it formed a part; that the plantation was sold under an execution against Alvin May; that Asa May became the purchaser, and then claimed a right to control the portion occupied by Seymour.

After taking possession he treats with Seymour, and they enter into a written and sealed lease, which was duly executed in the presence of two subscribing witnesses, and Seymour holds peaceful possession of twenty-five acres during the year A. D. 1877, under this lease, which was executed according to all the requirements of the statute in such cases provided.

The plaintiffs felt safe in resting their right to recover upon this lease, and, therefore, did not attempt to meet Seymour's statements in his testimony as to his title under Alvin May, nor to his statements of conversations with Asa May, which are not evidence under our statute and ought not to influence the court. It was a written instrument, and in law embraced the entire contract of the parties; it included all previous verbal understandings that were to be retained; it could not be contradicted by the surviving contractor; it was under seal, which, of itself, imports a consideration; it was entered into voluntarily, as the testimony fully established; its contents were explained to Seymour. He admits that Edwards told him what it was. It is true that

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it was not read to him, but he did not ask to have it read. He signed and sealed the lease with his eyes open, and ought not to escape its terms on the plea of ignorance.

Then, too, it is evident from Croom's testimony that Asa May took possession at the close of the year of all the land embraced in the lease except the few acres here sued for, and that Seymour made no effort to control or retain any more than the few acres around the house after the lease expired.

The petitioners believe that the court has overlooked the charge asked for by them, which was clearly applicable to the circumstances of the case. The substance of it was: If Seymour was induced by any fraud or deceit of May to sign the lease, it was not binding upon him; but ignorance alone would not excuse him. Such a charge, the petitioners believe, would have resulted in a verdict for them, for there was no charge of any unfair conduct upon May's part in the transaction, and his character for fair dealing was so well known that it would have taken strong evidence to satisfy a jury of the vicinage that Asa May had imposed upon an ignorant man. Instead of the charge asked for, the court virtually charged that ignorance alone excused Seymour, and further misled the jury by charging upon the question of title. One of the most serious difficulties in cases of this nature is to keep the jury from confusion upon the subject of the title; and this part of the charge alone was enough to affect the verdict.

This court finds the charge was erroneous, and if it was, the petitioners respectfully urge that their case ought to go before a jury with a correct charge. The jury are the sole judges of fact.

The plaintiffs did not deem it necessary to meet all the statements of defendant, and inferences from these statements might be drawn prejudicial to the testator's character by those who obtain all their views of the case from

the record without the knowledge of the parties a jury would have.

It is respectfully suggested that this court may have unconsciously been thus affected, and been influenced by the apparent equities of the case rather than its strict legal points. The plaintiffs relied on these legal points, which have been already referred to. They relied upon the lease, upon the character for integrity enjoyed by the testator in his lifetime, upon the fact that May did not impose upon Seymour's ignorance, that the contents of the lease were stated to Seymour, that he entered into it voluntarily, that he occupied the land in peace after executing it, that May recovered possession of the larger portion of the land after the year closed, and if Seymour did not know the full contents of the lease it was not because it was purposely kept back from him, but because he did not even ask that it be read to him.

It is respectfully suggested, too, that it would hardly be fair to sustain the judgment upon a different theory of the management of the case than was followed.

It was never claimed in the course of the trial by the court or counsel that the burden of proof was upon plaintiffs, to prove upon Seymour's part full knowledge of the contract he was entering into when he signed the lease; if it had been plaintiffs would have attempted to strengthen this point with further evidence. Had the case been managed upon this theory the plaintiffs would have pursued a different course, and the erroneous charge given by the court below and accepted by the defendant's attorney would seem to be reason enough for sending the case back to a jury, so that plaintiffs may have an opportunity to meet this view.

The executors respectfully pray for a re-hearing of the case, and an opportunity to argue the points which presented themselves so forcibly to this court, but which the

counsel for the defendant did not raise, and which therefore were not answered in their behalf, but they believe can be successfully answered, and they will ever pray, &c.

THE CHIEF JUSTICE delivered the following opinion of the court on the petition for a re-hearing:

The petition for a re-hearing sets forth several grounds therefor, which are herein considered.

It alleges among other things, that it is shown that Seymour rented from May twenty-five acres of land, and that before the death of May all the land except five acres had been restored to Mr. May, which five acres is sued for, that no fraud is shown by which Seymour was induced to sign the lease, either by the pleadings or the lease; but that it is shown that Seymour was fully informed of the contents of the lease and signed it voluntarily, and made no complaint that he had been imposed upon.

It is inferentially suggested that in the opinion filed, there is an unjust imputation upon the character of Mr. May, now deceased. We consider it entirely appropriate that the representatives of a deceased person take proper care to guard his memory.

While it cannot be necessary for this court to disclaim any intention to reflect upon the conduct or character of Mr. May, we must insist that a very strong impression was created in our minds by a careful examination of the testimony, that Seymour, because of his ignorance, had been led into an apparent assent to a contract, of the terms and the effect of which he was not informed, and which he repudiated at the very moment of making his mark to it, and which he had always insisted he would not assent to. Mr. May does not appear to have been present when this was accomplished, and doubtless would have dealt more openly with Seymour, but certain it is, that Mr. May's

agent or agents, whether intending it or not, pressed this ignorant man into a seeming assent, against which his mind and his intention protested.

The petitioners say that it was not claimed at the trial that the burden of proof was upon the plaintiff to show upon Seymour's part full knowledge of the contract he was entering into when he signed the lease, and if he had been, plaintiffs would have attempted to strengthen this point with further evidence. What oral argument was made in the court below we cannot know, but the question was fully presented by the record in the instruction, which appellant's counsel asked the circuit judge to give to the jury; in the instruction which the judge gave to the jury and which was excepted to; in the brief and argument of counsel for Seymour in this court, and in the grounds assigned for error. The third ground in the assignment of errors by the appellants is this: "3. The ignorance of the defendant, of the *contents* of the lease, does not discharge him from its obligations in the absence of fraud or misrepresentation of other unfair conduct upon the part of the lessor, and the charge of the court, which was to that tenor, misled the jury and was erroneous."

We are, therefore, still of the opinion that the question whether the defendant was bound under the circumstances which led to the making his mark to the paper in question, either with or without actual fraudulent intent on the part of the lessor's agents, was submitted to this court by the respective counsel.

Petitioners say that the testimony of the defendant as to his conversations with Asa May is not competent evidence under our statute, and should not influence this court. That testimony was referred to in the opinion, it is true, but so far as it related to the conversation with May, it was of not much consequence in view of the testimony of other witnesses. Yet that testimony was given to the jury

without objection, and having been so given and submitted to the jury, it is very questionable whether it can be objected to here, even if it appears clearly to have influenced the jury, for it is a well settled rule that in order to avail himself of an alleged error in the admission of testimony, an exception must be taken by a party to the ruling of the court in admitting it, or refusing to strike it out. Very little, if anything, was proved by the testimony of the defendant, as to any direct transaction with Mr. May, which was not proved by unquestionable testimony. Most of his testimony related to the circumstances of his tenure, and the occupation of the land, and his understanding of what the agreement was. The theory of his defence was that he was in rightful possession, as against Asa May, and that he did not hold in subordination to him.

The following is the material portion of the testimony on the part of the complainants: Blackburn testified that he witnessed the signing of the lease. It was drawn up by Mr. Edwards, who kept May's books. Seymour signed it voluntarily. Edwards said to Seymour, the agreement is ready, and he wanted him to sign it now and close the matter up. Seymour said, "Well, if the land is Mr. May's I will pay rent for it; if not, I will not;" and then signed it. Seymour is living in the house. On cross-examination witness says the lease was signed at Roach's blacksmith shop. Seymour has been in possession *many years*—when Alvin May owned the plantation, and after Asa May bought it. Heard him speak of it as his place or home. Edwards wrote Stephen Seymour's name to the lease and Stephen made his mark, touching the pen. Defendant cannot read writing or write his name. The lease was not read to him in my presence.

Croom testified, describing the land now occupied by the defendant. As manager of the Asa May place he planted oats there last year. When he went on the place as May's

superintendent the hands were planting oats there, and he continued it and planted near to Seymour's door. Was not disturbed by Seymour. Planted by May's instructions; did not ask defendant's permission to plant, and he gave none; did not ask him anything about it. Was instructed by Mr. May to put somebody else into the house, as some of the hands needed it; but Seymour refused to leave, claiming the house as his own. Mr. May died in the spring, and I said nothing more to Seymour until recently. S. Pasco, one of the executors, spoke to Seymour about the house last fall; he asked Seymour what he was going to do about it. Seymour said he did not know, but would go up and see him about it. Witness asked Seymour, since Christmas, what he was going to do about it; that he wanted the house. Seymour said if the case was decided against him he would give it up; if not, he would not. Witness asked Seymour what he signed the lease for if the land was his; and Seymour said that the understanding was that he was not to pay rent unless the place was Mr. May's.

On cross-examination witness said that there used to be a cross fence separating the land included in the lease from the rest of the field on that side of the road, but *witness had it removed.*

S. Pasco, for complainants, testified that last fall, in company with Mr. Croom, the superintendent, he met Stephen Seymour on the public road and asked him if he was not going to give up the house. He acknowledged renting the land from Mr. May, and did not refuse to give up the house; said he would come up and see witness about it. He never came, and witness commenced this suit. On cross-examination, witness, being asked how defendant acknowledged renting the land, said it was in the course of their conversation that the land was spoken of as the land rented from Mr. May, and Seymour did not deny the renting, but said he would come up and see witness about the matter.

This is substantially all the testimony offered by complainants beside the lease. The testimony of the defendant need not be repeated at length here. He testified that he bought the place of Alvin May and paid for it before he (May) was "sold out," and had been in possession ten or eleven years, living there. After Asa May, Edwards came and repeated Mr. May's request to sign a "paper for the rent," and that he told Edwards that the land was in controversy between him and Mr. May; and that if it was Mr. May's land he would pay rent, but if it was defendant's land he would not pay any rent; and with this understanding he signed the paper. That he could not read or write, the paper was not read to him, and he did not know what was in it when he signed it. He says, also, that though he gave every opportunity by pointing out his property, no attempt was made by Mr. May, or his representatives, to enforce the collection of the rent.

We think all the testimony bears upon the questions of the validity of the lease; whether Seymour was or became a tenant of May; whether the lease was the agreement or expression of the mind of Seymour; whether, while always insisting that the land and house were his own, bought and paid for ten years before, he did voluntarily intend to surrender to one whose right he constantly disputed.

The testimony of Blackburn and Croom clearly settle these questions. Instead of this land having "been restored to the actual possession" of Mr. May by defendant, as alleged in this petition, complainants prove by Croom that he took possession of the land, removed fences, plowed and planted by May's instructions up to Seymour's door without saying anything to him about it, and "Seymour did not disturb him." It is clearly shown that when the lease was produced, already signed by May, Edwards said to Seyomur, the *"agreement is ready,"* and wanted him to "sign it now and close the matter up." It was not called a lease, but an

"agreement." What agreement? Seymour had always professed readiness to pay rent if the land belonged to Asa May, but if it was his own, he would not pay rent. There was a controversy existing about their respective rights. Seymour, in the act of making his mark to the paper, expressed what he understood the *"agreement"* to be. He had been told it was an agreement "about rent." He was willing to enter into an agreement about rent, and he repeatedly indicated what kind of an agreement it should be. The tenor of the whole evidence shows it, and shows what he supposed he was assenting to.

It is no answer to say that this phase of the case was not much argued before the court. The question was presented by the exceptions, the argument of Seymour's counsel, and his written brief, and by the assignment of errors flatly; and it would be a denial of common intelligence to say that this is not the material question, and one that first and last enlists the attention in reading the record of this case. Nowhere does it appear that Seymour acknowledged this lease as his agreement, or that he was a tenant upon this land. Mr. Pasco says Seymour "acknowledged the renting" of the land from Mr. May, and "did not refuse to give up the house but promised to go up and see about it." The cross-examination shows that the "acknowledgment" was, that in the course of the conversation "the land was spoken of as land rented from Mr. May, and Seymour did not deny the renting," but said he would "come up and see about it."

With a person of ordinary education and intelligence this might be treated as a circumstance showing that a tenant acknowledged his tenancy. Seymour's tenure had been called a "renting" in the efforts to induce him to leave, (and it is well shown what kind of renting he had assented to,) and in dealing with a person of his mental caliber, and being addressed by a person of intelligence and of different

social position, it cannot fairly be exacted of him that he shall be deemed to assent, particularly when instead of assenting he evades discussion, aand postpones the subject by promising to "come up and see about it."

Previous to the signing of the lease nothing was said to defendant about his becoming a "tenant" to May or paying rent that did not bring from him the response that he would agree "to pay rent if the land was May's," and when told that the "agreement" was now ready and the matter must be closed up, he repeated what his understanding of the agreement was, and his understanding was not corrected by the agents of Mr. May then and there.

Under the circumstances can it be candidly pretended that Seymour did "with his eyes open," without apparent consideration, without apparent benefit to himself, but on the contrary, to his probable detriment, enter into an agreement whereby he surrendered his supposed right to his land and home, while in the same breath he declares he will not and does not intend any such thing, unless he shall be satisfied that Mr. May has the better right? The question tried was not one of title, but whether Seymour had within three years held wrongful possession of the property against the consent of the plaintiff entitled to it. All the evidence was pertinent to or bore upon this issue, and the jury considered it; it *all* bears upon the question whether the lease is the contract of the defendant. Contracts are binding according to the mental comprehension and capacity of the contracting parties. "Where one places reliance upon another, the one trusted shall not take advantage of such confidence to the prejudice of the other." New vs. Wambach, 42 Ind., 456; 65 Barb., 346.

In Foster vs. McKinnon, 4 Law R., (Common Pleas,) 704, (cited in Gibbs vs. Linabury, 22 Mich., 479-486,) a witness, Callow, who was acceptor of a bill, had produced the bill to the defendant, who was advanced in life, for him to put

his signature on the back after that of one Cooper, the payee and first endorser, Callow not saying it was a bill, and telling the defendant that the instrument was a guarantee. Defendant did not see the face of the bill at all. But it was of the usual shape and bore a stamp, the impress of which was visible at the back of the bill. Callow also testified that the defendant, believing that the document was only a guarantee, then signed his name after Cooper's. The court say: "It is invalid, *not merely* on the ground of fraud, but on the ground that *the mind of the signer did not accompany the signature.* In other words, that he *never intended to sign,* and therefore, in contemplation of law, *never did sign* the contract to which his name was appended. * * * In the case now under consideration the defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and if he was guilty of no negligence, it was not even his fault that the instrument he signed turned out to be bill of exchange."

In Selden vs. Myers, et al., 20 Howard, U. S., 506, 509, Chief Justice Taney delivering the opinion of the court, says: "It is true that Selden is an unlettered man, and can neither read nor write. He makes his mark to the instruments he executed, and dealing with such a person, it is incumbent on Myers & Co. *to show, past doubt, that he fully understood the object and import of the writings upon which they are proceeding to charge him,* and if they had failed to do so the above mentioned testimony, offered by the appellant, as to the state of the accounts between them at the time, would have furnished strong grounds for inferring that he had been deceived, *and had not understood the meaning of the written instruments he signed.*"

The reasoning of Judge Taney disposes of the question of negligence on the party of Seymour in not requiring the

lease to be read to him before signing it. It was the duty of the persons of superior intelligence, who were dealing with him, to inform him fully, and a man so ignorant as Seymour is shown to be is not chargeable with negligence when dealing with persons who admit they were well aware of his want of intelligence. It is not necessary in this case to charge that Mr. May or his agents intended to deceive or defraud Seymour; the contract wants validity, as stated in Foster vs. McKinnon, "becausce the mind of the signer did not accomapny the signature."

In view of this rule, so emphatically endorsed by Chief Justice Taney and the Supreme Court of the United States, the Circuit Judge very properly refused to give the instruction asked for by the plaintiffs' counsel, considering the capacity and degree of intelligence manifest to the court of this defendant; and the rule laid down goes very far toward sustaining the charge given by the court, to which the complainants excepted. Considering the whole case, upon the law and the facts as they appear here, the proper tribunal to which the rights of these parties should be referred is one which is empowered to try the title to the property involved. The method adopted by Mr. May's agents, of determining the rights of the defendant, does not seem to be the proper one.

We are well satisfied that under the charge prayed for by complainants, if it had been given by the court, the jury could not, upon the evidence, have found that this lease was the agreement of the defendant, or that he acquiesced in it in any manner after it was signed. We think further, that under any charge that might have been given, upon the facts as presented here, a verdict for the defendant must have been sustained; and this, without in the least reflecting upon the good name of Mr. Asa May.

The rehearing is refused.

MR. JUSTICE WESTCOTT delivered the following opinion on the petition for a rehearing:

Upon the evidence, omitting everything that might be excluded upon the ground that it referred to transactions between Asa May, deceased, and the defendant, I think there is enough to show clearly here that the defendant did not in fact assent to any surrender of his possession to Asa May.

The law, as I understand it applicable to this case, is announced by Chief Justice Taney in Sheldon vs. Myers et al., 20 How., 509, to the effect that it is incumbent on a person dealing with another, who can neither read nor write, to show past doubt that the ignorant man fully understood the object and import of the writings upon which he is proceeding to charge him. In this case it is not shown that the instrument was read or fully explained to the party unable to read or write and I do not think he can be held bound by the contract. The instrument being removed as evidence, I see no case for the plaintiff.

It seems to me here that the verdict was in conformity to the evidence, that the instructions were really more favorable to the plaintiff than the rule as announced by the Supreme Court of the United States which covers this case, and that to grant a new trial would be action in conflict with the rule sustained by the decisions of this court in the cases cited by the Chief Justice. As to the action of Mr. May, I do not see that he was guilty of any fraud or improper conduct.

MAYO AND STOKES, APPELLANTS, VS KEYSER'S EXECUTRIX, APPELLEE.

1. If a party, after a judgment upon demurrer against him, amends his pleadings so that an issue is formed which is tried by a jury, he waives all exceptions which he might have taken to the judgment on demurrer, and will not be permitted to assign them for error in this court.

2. If a party desires to have the ruling by the court upon the demurrer reversed, he must not plead over, but take his appeals from the final judgment perfected upon the demurrer.

Appeal from the Circuit Court for Santa Rosa county.

The facts of the case are stated in the opinion of the court.

C. C. Yonge and *G. G. McWhorter* for Appellant.

John C. Avery for Appellee.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

This was an action of assumpsit upon a promissory note, brought by H. S. Keyser, executrix of the last will and testament of the Wm. J. Keyser, deceased, against the defendants Mayo and Stokes. The amended declaration consisted of four counts. The defendants, on the second day of February, 1880, demurred to the first, second and third counts, and plead to the fourth. On the hearing the court overruled the demurrers. The defendants further filed pleas on the 27th January, 29th March and first of April, 1880. The plaintiff then demurred to the several pleas so filed by the defendants, and on the second day of April, the court upon a hearing made an order sustaining the demurrer as to all of said pleas, excepting as to the plea of

L. G. Mayo, filed second February, 1880, as to which plea the demurrer is overruled.

On the 7th day of April, 1880, the defendants plead over to the amended declaration, replications were filed and the cause was tried by a jury who found a verdict for the plaintiff, upon which judgment was duly entered. There is no bill of exceptions and the only errors assigned are as follows:

1. The court erred in overruling the demurrer to the amended declaration.

2. The court erred in sustaining the demurrer to pleas filed by the defendants on the 27th January, 29th of March, and 1st of April, 1880.

This court, in a series of decisions, have determined that if a party, after judgment on demurrer against him, amends his pleadings and makes an issue which is tried, he waives all exceptions which he might have taken to the judgment on demurrer, and will not be permitted to assign them for error in this court. If the party desires to have the ruling by the court upon the demurrer reversed, he must not plead over, but permit the judgment on the demurrer to stand.

Had the defendants permitted the judgment on demurrer to their pleas to have stood and appealed from that, it would have reached back to the declaration, but by waiving their demurrer in pleading over and going to trial upon the issues made, they lost their right to except to the judgment of the court upon the demurrers to their pleas. Bailey vs. Clark, 6 Fla., 516; Ellison vs. Allison, 8 Fla., 206; Hooker vs. Johnson, 8 Fla., 453; Robinson vs. L'Engle, 13 Fla., 483; Garlington vs. Priest, 13 Fla., 559; Johnson vs. P. & P. R. R. Co., 16 Fla., 623.

The judgment must be affirmed.

THOMAS DONALD, ET AL., APPELLANTS, VS. DANIEL L. McKINNON, RESPONDENT.

1. In the abesnce of a warrant being annexed to the assessment roll delivered to the collector of revenue as required by law, he cannot proceed to enforce the payment of taxes and a sale made without such warrant passes no title.

2. A simple transcript of a judgment entry does not prove a judgment in a collateral proceeding. Enough should appear to show jurisdiction.

3. If a defendant in execution is shown to be the landlord of the person in possession at the date of the sale under the execution, the purchaser at the sale acquires his right, and upon the expiration of the term of the tenant he, the purchaser, can recover the possession of such tenant although the legal title be shown to be in a person other than the tenant.

Appeal from the Circuit Court for Jackson county.

The facts of the case are stated in the opinion of the court.

J. F. McClellan for Appellant.

D. L. McKinnon for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The respondent McKinnon brought his action of ejectment against the appellants in the Circuit Court for Jackson county.

To the declaration framed under the statute the defendant pleaded first not guilty; second, a previous judgment in a court of competent jurisdiction in an action of ejectment as to the same land. To the second plea plaintiff replied that subsequent to said judgment and prior to the institution of this suit he had acquired new titles to said

lands. There was issue as to these pleas, trial and verdict, and judgment for plaintiff. From this judgment defendants appeal.

The plaintiff claims title through two sources, a deed after sale of land for taxes, and a deed after sale under a judgment rendered by a justice of the peace.

As to the tax deed. Ruring the trial defendant proved by L. M. Gamble, that he was collector of revenue for the year 1876, that he had the assessment book for that year and turned it over to his successor in 1877. "This book" was then offered to show that there was no warrant to it to the collector. Upon objection by plaintiff, the book was ruled out by the court, and to this action there was an exception. The record recites further in this connection, that "defendants offered Frank Phillips, Clerk of the Circuit Court, of Jackson county, with the tax book deposited in his office for the year 1876, and offered to prove that there was no warrant to said book, signed by the assessor of the said county, empowering the collector to collect the taxes for that year, and if not paid, to sell in order to collect." The book was excluded and there was an exception.

Under the statute then controlling the assessment and collection of revenue, chapter 1976, laws, it was the duty of the assessor to file with the clerk the original assessment book, but the law did not require any warrant to be annexed to it or to the copy sent to the Comptroller. The court, therefore, was right in excluding the original assessment book from the jury, when offered for the purpose of showing that no warrant was attached to this copy. It was immaterial whether there was such a warrant annexed to it. When, however, the then (that is in 1876) tax collector of revenue, L. M. Gamble, was offered as a witness to prove that there was no warrant to the assessment roll of 1876, under which this tax sale was had, we cannot see that this evidence was properly rejected. The law required that to

the assessment roll delivered to the collector of revenue, a warrant under the hand of the assessor should be annexed in the following form to-wit: giving the form, &c.

Without this warrant "delivered by the officer of the law, designated for that purpose, the collector has no authority to proceed to enforce the payment of taxes." This being omitted, the performance of all the other acts, such as due advertisement, will lay no foundation for the sale of the land. (5. Ired., 131; 7 New York, 517; 14 New Hamp., 84; Hilliard on Taxation, 396; Cooley on Taxation, 292; Blackwell on Taxation, 167.) The warrant in this proceeding fills the place and performs the functions of a summons. It is the writ to the officer by which he is authorized for public purposes to collect the tax, or in the event of its non-payment to subject the property to sale. For this reason we think that the court erred in rejecting the proposed testimony of Gamble, the person who at the time of the sale was the collector of revenue, and who proposed to produce the assesment roll.

As to the justice's judgment; the court ruled correctly, that there must be proof of the judgment in order to derive title from a sale thereunder; but what we have in the record is a simple transcript from the docket or book of entries of the magistrate of the entry of judgment. This is not sufficient. (5 Wendell, 293; 7 Cranch, 408.) A certificate of a justice's judgment "to be competent evidence, must show on its face that the justice rendering the judgment had jurisdiction, as well of the person as of the subject matter of the suit." The statute of this State, section 13, chapter 2040, laws, provides that the justice's "docket, or a certified copy thereof, shall be evidence of the matters therein stated," and it is essential that in all cases where a judgment is sought to be proved, that so much of the proceedings as show jurisdiction should

appear. As to the general subject, see 2 Phillips on Evidence, 4 Am. ed., by Cowen and Hill, note 406.

The next question here is as to the matter of title. Plaintiff claims that defendants are the tenants of Grantham, whose interest in the land he has acquired under the sales mentioned. If this be so he shows a good right to the possession as against the tenant upon the expiration of the time for which the tenant was to hold.

In some cases, although the claimant may not in fact have title to the land according to the general acceptation of the term, and in conformity to the general rule in ejectment, still the circumstances may be such as that between the parties the title is established. In this case, if the plaintiff has purchased the right of Grantham, and the relation between the defendants and Grantham was that of landlord and tenant when he purchased, then upon the termination of defendant's right to possession as tenant, the plaintiff may recover if he represents the lessor's right to possession, although in fact the strict legal title may be in the State of Florida. 4 John., 210; 7 Cowen, 637; 10 East, 355; Taylor on Ejectment, 165, 206; 1 Blackf., 135; 1 Burr., 119; 3 Dall., 457; 1 Bibb, 129.

All the title which a landlord has to show is the contract of tenantcy, and the termination of the right of tenant to possession. If the plaintiff here acquired the landlord's right under the sales, he should recover upon like proof.

As a matter of course, there must be full proof of the tenancy and full identification of the land which was the subject of the tenancy, as well as that it is the land described in the declaration. We deem it unnecessary, as there is to be a new trial, to make any commentary upon the evidence in these particulars.

The judgment is reversed and a new trial awarded.

BURTON W. BELLAMY, APPELLANT, VS. ALEXANDER B. HAWKINS, APPELLEE.

1. In an action by one executor against his co-executor to recover a share of money allowed to the executor in gross, as compensation for administering an estate, which money was alleged to have been received and retained by the defendant, the question to plaintiff as a witness in his own behalf on the trial, whether the plaintiff was always "willing, anxious and ready" to perform duties as an executor, is not a material question, the statute giving compensation for responsibility assumed and for services performed.

2. Where a witness has already testified to certain facts, it is not error to refuse to hear the same facts repeated by the same witness, upon the same direct examination.

3. A certificate by the custodian of a record or document, stating that the annexed copy is an "extract" from the original, it will not be received in evidence if objected to.

4. A certificate that the "extracts" from a record contain all of the original that affects the matter in controversy, is not evidence that the omitted parts are not material, this being a question for the court, and not for the certifying officer, to determine, from an inspection of the entire document.

5. Oral testimony of the Judge of Probate, as to the contents of a record or paper in his office cannot be received to prove the contents of the writing, the original being in existence and accessible.

6. Oral testimony of the admission of a party as to the existence, the amount or effect of a judgment or decree, cannot be received for the purpose of showing the existence of the judgment, or its legal purport, the record being accessible.

7. Oral or written testimony to the admissions or declarations of an executor, that he has received a certain sum of money as compensation and commissions for administering an estate, are not evidence in behalf of a co-executor who sues him for a share of such money, without showing by the judgment, order or decree of the court, that the claimant is legally entitled to a portion of the money so received.

Appeal from the Circuit Court for Leon county.

The declaration in this case is as follows:

Burton W. Bellamy, by Angus Patterson and White and Bryson, his attorneys, sues Alexander B. Hawkins, for the sum of fifteen thousand dollars, which he owes to and unjustly detains from him. For that, whereas, the said plaintiff, and the said defendant were co-executors of the last will and testament of William Bailey, deceased, from the beginning of the year, A. D. 1868, to the commencement of this suit, and large amounts were annually allowed to the executors of said estate by the Probate Court of Leon county, making in the aggregate $20,000.00, and the said defendant, as co-executor, took possession of the commissions and allowances, and retained the share coming to the plaintiff, and has refused to pay the same, and the plaintiff claims $15,000.00.

And whereas, also, the said defendant, as co-executor, afterwards to-wit; on &c., aforesaid, at &c., Leon county aforesaid, had, and received a certain other sum of money as co-executor, &c., to-wit: the sum of fifteen thousand dollars of like lawful money to and for the use of the said plaintiff, and to be paid by the said defendant to the said plaintiff, when he the said defendant should be thereunto afterward requested, whereby and by reason of the said last mentioned sum of money being and remaining wholly updaid, an action hath accrued to the said plaintiff to demand, and have of and from the said defendant, the said last mentioned sum of fifteen thousand dollars, other parcel of the said sum above demanded; and the plaintiff claims $15,009.00; and $15,000.00 for money received by the defendant as co-executor for the use of the plaintiff; and $15,000.00 for money found to be due from the defendant as co-executor to the plaintiff, on accounts stated between them; and the plaintiff claims $15,000.00.

The defendant Hawkins plead the general issue of "never indebted," as well as several special pleas. The effect of

the issue was to put the plaintiff to strict proof of the entire case set up by the declaration.

In response to a plea that Bellamy performed but a very small portion, if any, of the labor and service, and incurred but very little if any of the responsibility of the administration of the estate, and had been fully compensated therefor, Bellamy replied that Hawkins wrongfully prevented him from performing a large portion of services and labor, that he was at all times willing and ready to perform, and actually did perform so far as it was in his power; but Hawkins took the estate and intentionally placed it beyond the reach of the plaintiff to prevent him from administering, and plaintiff took issue upon that part of the plea as to his incurring but little if any responsibility in the administration of the estate, and also upon that part alleging he had been fully compensated. Upon this replication defendant joined issue. There was considerable testimony taken on part of the plaintiff, but before announcing that he rested, his counsel stated that in view of the rulings of the court, he should submit to a verdict, and the jury then returned a verdict for the defendant, and judgment was entered as follows:

"This day came the parties by their attorneys, and the jury sworn to try the issues in this cause appeared in court according to their adjournment, and the plaintiff having announced that in view of the rulings of the court he should submit to a verdict, the case was given to the jury and thereupon, they, upon their oaths do say: 'We the jury find for the defendant.' Therefore, it is considered by the court that the plaintiff take nothing, and that the said defendant go without day and recover against the plaintiff his costs by him in this behalf expended, and said plaintiff in mercy," &c.

The other facts are sufficiently stated in the *opinions* of the court.

Angus Patterson and *White & Bryson* for Appellant.

George P. Raney for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

The first error assigned is in refusing to permit the plaintiff to show by his own testimony that he was "at all times willing, anxious and ready" to perform any duties pertaining to his executorship of the estate.

The plaintiff testifying as a witness in his own behalf, was asked by his counsel to "state whether or not he was at all times willing, ready and anxious to perform any service or duties pertaining to said estate." The defendant's counsel objected to this question, and claimed that the witness should be required to state acts and facts tending to show the existence of his willingness, anxiety and readiness, and the court sustained the objection. Plaintiff sues his co-executor, alleging that defendant assumed control of all the assets, and of the management of the estate, and prevented plaintiff from performing his duties in reference to its care and management, though plaintiff offered and was always ready, willing and anxious to assist, and thereupon demands an equal share with the other executor of the compensation allowed by law. The statute provides that the executors be "allowed all reasonable charges * * in the administration of the estate," and "a fair and just compensation for their services, and also a compensation not exceeding six per cent. on money arising from the sale of personal property and lands of the deceased." Thomp. Dig., 208.

The question here propounded to the witness assumes that the plaintiff, as an executor, is entitled to the compensation allowed by law for services performed, on showing that he was "ready, willing and anxious" to perform.

Readiness, willingness and anxiety exist in the mind, a

mere physical and mental condition or state of existence. I do not think the statute contemplates that *compensation* shall be allowed on account of this mental or physical condition, unless services are performed or risk assumed, or an attempt is made to perform services or assume responsibilities in relation to the management of the estate. Responsibility and risk are assumed by the acceptance of the trust. This assumption requires no proof beyond the fact of qualifying as an executor, and that was already proved. Further responsibility and risk are assumed by the active management of the property. These are properly the subjects of compensation. Time, labor and skill employed in the management of the estate are to be taken into account in the award of compensation by the Probate Court. If the condition of "readiness, willingness and anxiety" of an executor, without acts or attempts to act, entitle him to compensation, it must be by force of the statute, but we do not see that the statute refers to these terms or to such condition. It mentions "services," and "compensation" for "services," "reasonable charges," and commissions "on money arising from the sale of property." Readiness to act without acting, and willingness and anxiety not manifested by acts or efforts are not subjects of compensation, and are therefore not the foundation of a claim. If the staute gives the plaintiff what he demands, because he is an executor, the question and the affirmative answer to it would be immaterial. If the defendant has money belonging to the plaintiff, it is not because of plaintiff's mental condition or readiness, but because the law entitles him to it as a *compensation* for responsibility assumed and acts performed or attempted. We discover further, in reading the testimony of the plaintiff, that he shows performance at sundry times of his duties, and sundry efforts at other times to be more active in the management of the estate, and to assist his co-executors. He says further: " I was at all

times ready to act in the administration," and this is repeated in substance in connection with the detail of his efforts, all through his testimony. The question had been previously, and without objection, fully answered. There can be, therefore, no ground for holding the ruling of the judge, in rejecting the question, to be erroneous; first, because it was not essential; and second, because the plaintiff already had the desired testimony before the jury upon his direct examination.

The second ground assigned for error is that the judge "refused to permit the records and proceedings of the Probate Court, pertaining to the administration of the estate of William Bailey, or certified copies thereof, to be used in evidence."

The record states that the plaintiff "produced and offered in evidence the books containing the annual settlements of the estate of General William Bailey, but to the use of the same in evidence the attorney for the said defendant did then and there object, unless upon the understanding that certified copies of the settlements or accounts should be filed before the case should be submitted to the jury, which objection was sustained, but the plaintiff was permitted to read from the books, under the direction of the court that certified copies of the accounts should be so filed."

"The books" referred to were doubtless the records of the Probate Court. No error can be alleged to the ruling of the court in relation to such books, because no exception was taken to the ruling. Whether he actually read from the books what he desired, or abandoned the offer, is not distinctly stated. It is certain, however, that he waived any advantage of the ruling by not excepting to it.

As to the "certified copies" of the records and proceedings of the Probate Court, which were offered in evidence by the plaintiff and rejected by the court, there were seven papers offered, three of which were entitled "annual account

current of the executors of the estate of General William Bailey," signed by W. Denham and A. B. Hawkins, executors; two "annual account current of the estate of William Bailey, deceased," for 1871-2 and 1872-3, "William Denham and A. B. Hawkins executors;" one "annual account current of executor of estate of General William Bailey, deceased," and one "A. B. Hawkins, executor in account with estate of William Bailey, deceased;" the two latter signed by A. B. Hawkins executor.

The offering of these papers is thus stated in the record: "Plaintiff, by his attorneys, further to prove the issues in his behalf, then and there produced and offered in evidence the following certified extracts from the records of the Probate Court of Leon county."

These papers were each certified by the County Judge as follows:

"I, Henry C. Rippey, County Judge in and for said county, do hereby certify that the within is an extract from the annual account current of executors (or 'W. Denham and A. B. Hawkins executors,' or 'A. B. Hawkins executor,') of the estate of William Bailey, deceased, and is a true copy of the items of compensation charged for in said account, and the amount allowed to said executors (or executor) and a correct copy of the orders of the court in relation thereto, as appears of record, * * * and that there are no other allowances to said executors in said account of record in my office. In testimony," &c. Signed and sealed by the judge.

The defendant's attorney objected to the reading of these papers, because they were only extracts from the annual returns, and not copies of the entire returns. The judge, at first, ruled that the papers should be received; and, upon further objection by counsel, sustained the objection and refused to permit such extracts to be read to the jury. To which ruling plaintiff excepted.

It is a well-established rule of evidence that when a document or record, or a copy of it, is offered, the entire record of the cause or transaction must, if possible, be produced, or the certified copy must contain, or must purport to contain, a copy of the entire record of the cause or transaction; and that a copy of a part, or of an extract therefrom, is not received as evidence. A certificate by the custodian of a record that a paper offered contains a copy of all that may be material to the case on trial is not evidence of that fact, the court before whom the trial is had being the proper judge of the materiality of the contents of the paper or record, and of the bearing of each part upon every other part; and the custodian of the record cannot determine the question by a certificate annexed to a partial copy.

"When records are exemplified the whole in general must be exemplified; for the construction is to be taken from a view of the whole together." (1 Phillips Ev., Chap 5.) In the notes to Ph. Ev. by Cowen and Hill, part 2, n. 713, it is said: "The rule in respect to copies of records under the seal of the court is * * * that in general the whole record which concerns the matter in question should be exemplified, for the court must be enabled to judge of the legal effect of the whole of it, which may be quite different from that of a part; a bare *extract,* therefore, is not the best evidence of which the case is susceptible." Edminston vs. Schwartz, 13 Serg. and Rawle, 135; Vance vs. Reardon, 2 Nott and McCord, 299; Dismukes vs. Musgrove, 8 Mart. La. Rep. (N. S.), 375, 381; Ingham vs. Crary, 1 Pa., 389, 394; Christine vs. Whitehall, 16 Serg. and Rawle, 98; Griffith vs. Tunckhouser, 1 Pet. C. C. R., 418; Ferguson vs. Harwood, 1 Cranch, 408.

The court committed no error, but strictly adhered to the rules of the law in rejecting the copies of extracts offered.

The third ground of error assigned is that the court refused to permit plaintiff to show, by the testimony of the

Judge of the Probate Court, the aggregate amount allowed to the executors of said estate, as appears on the records of his office, and that they were allowed in gross; and the fourth ground of error was in refusing to permit the plaintiff to prove by the witness Myers the amount of commissions allowed by the Probate Court, as admitted and stated by the defendant, and as to what he, the defendant, had done with said commissions.

The universal rule is that the best evidence, of which the nature of the case admits, must be produced.

The plaintiff's claim rests upon an alleged allowance by the judgment or decree of the Probate Court.. Without such allowance there is no cause of action. The defendant is charged with obtaining money to which plaintiff is entitled, by reason that it has been allowed to all the executors, in gross, by the Probate Court. The judgment or order of that court is the best and only legal evidence of such allowance and its amount, and for what purpose, and for what services, charges and expenses it was allowed, the record being in existence and accessible.

The statement of the custodian of a record as to its contents is no more valuable than the statement of any other person who has read it. The record itself is the evidence, and the statement of the judge is not evidence of its contents.

The same rule will apply to the offer of the testimony of Mr. Myers, as to the adimssions of defendant of the amount allowed by the Probate Court. "The parol admission of a party, made *en pais*, is competent evidence only of those facts which may lawfully be established by parol evidence; it cannot be received either to contradict documentary proof or to supply the place of existing evidence by matter of record." (1 Greenl. Ev. §203; Bivins vs. McElroy, 11 Ark., 23; Mason vs. Park, 4 Ill., 532; Jameson vs. Conway, 10 Ill., 227; Welland & Co. vs. Hathaway, 8 Wend.,

480.) The questions addressed to Mr. Myers were objected to upon the further ground that they were leading. The ruling of the court was strictly correct in refusing the testimony of Myers to the admissions or declarations of the defendant as to the amount of the allowances, which were matters of record, unless the record was produced. The question was "whether you heard the defendant say what amount of commissions were allowed the executors of Genereal Bailey's will, and how much the defendant received, and whether A. Z. Bailey received his share?" And the further question, "state whether or not the defendant said in your presence that the amount of commissions received by the executors was $16,000, or what other sums, and how were they divided, and did he say that the plaintiff received any except his note?"

The inquiry as to the amount received of allowances by each executor was pertinent according to the theory of the pleadings, and competent in order to show whether defendant had received money properly belonging to plaintiff under the order or decree of the Probate Court, but without showing such order the testimony proposed proved nothing as between these parties. It was not error, therefore, to refuse the proffered testimony until the order of the Probate Court was shown. The existence of a judgment or decree, or its amount or effect, cannot be proved by the admissions of parties, the original record being in existence and accessible. Jenner vs. Joliffe, 6 Johns., 9; Ware vs. Robertson, 18 Ala., 105; Morgan vs. Patrick, 7 Ala., 185; Bivins vs. McElroy, 11 Ark., 23.

Fifth ground of error; that the court refused to permit the answer of defendant in a chancery cause between the same parties as to the amount of commission allowed the executors, and as to the mode in which the defendant divided them to be read in evidence.

The plaintiff offered in evidence a certified copy of a pa-

per purporting to be an answer to a bill in chancery, signed by defendant, in a suit between the same parties, in which, among other things, it was stated what amount of commissions and allowances had been received by each and all the executors, in the aggregate, and how much defendant had received, not showing what amount had been allowed to each or all of them, nor admitting that defendant had money belonging to the plaintiff.

This testimony is of the same character and to the same effect as the testimony offered to show the admission of the defendant. As before remarked, according to the theory of the plaintiff's pleadings, the statements of the answer may be proper evidence to show the amount received by the defendant of the estate for services, commissions, expenses, &c., and may aid in determining whether defendant has received money which, under the order of the Probate Judge, may belong to the plaintiff and other executors. But the answer by itself, or in connection with the other testimony before the court, does not show that defendant has received any money of the plaintiff, or which the defendant may not legitimately be entitled to. The records of the Probate Court, with the orders decreeing allowances, commissions, &c., are not before the court, and without such orders the offered testimony is not connected with the case. What amounts had been *allowed to the executors* is not apparent by the evidence before the court. Without some legitimate evidence of this fact, it cannot be determined how much each is entitled to for services, and commissions, and expenses, and whether the defendant retains money belonging to the plaintiff.

The defendant saw fit to hold the plaintiff to strictness of proof, and we do not find that the court violated the rules of evidence in sustaining his objections.

The judgment is affirmed.

Bellamy v. Hawkins—Petition for Rehearing.

The preceding opinion was delivered at the January term, A. D. 1880, and at the same term the appellant filed a petition for rehearing, which was not disposed of till the present term. The petition is as follows:

The petition of Burton W. Bellamy, appellant, in a certain cause wherein Alexander B. Hawkins is respondent, decided at the present term of the Supreme Court, respectfully shows that this court seemed to think that the records of the Probate Court of Leon county were evidence before the jury in the court below, whereas they were all ruled out by the judge of said court. In the beginning of the trial in the court below the said judge permitted the records to be read, and defendant objected unless certified copies of the record were furnished, and the court ruled that certified copies or extracts should be furnished; but when the extracts were produced defendant objected to the extracts because they were *extracts* and not the complete copies. The court overruled the objection and defendant excepted, all of which appears in the record; but the defendant did not take an appeal, and is not entitled to any benefit from said exception; but the same cumbers the record, and has a tendency to mislead this court.

But afterwards the judge of the court below refused to allow the said extracts to be used as evidence, not because they were *extracts*, but because they were *copies* of the record of the Probate Court of Leon county, (if they had been ruled out because they were extracts full copies would have been furnished,) and were not signed by Burton W. Bellamy, thereby ruling out the entire records of the Probate Court, upon which appellant's whole cause of action was and is based. These extracts were put for the record by the ruling of the court.

Appellant's next best evidence was the admission of the defendant as to the amount of commission received by him which he made to several persons, and also made under oath

in his answer to the suit in chancery, the same cause tried by the same parties; but this was also ruled out by the court on the grounds that the record of the Probate Court, or copies thereof, was the best evidence, when those had also been ruled out.

Appellant submits that this was the only evidence by which he could prove the amount received by the defendant, and that his admission was, and is, the best evidence.

Appellant submits that all of his evidence was ruled out by the court below, and exceptions were noted; that, although there is a large amount of testimony in the record in this cause that had been taken before these adverse rulings, and were copied to show the proceedings, yet every material part was ruled out by the court; that is to say, the appellant was not permitted to use as evidence the records of the Probate Court, nor certified copies thereof, nor the evidence of the County Judge, (the custodian of them,) as to what they contained, nor even the admission of the defendant, made verbally and in writing under oath, as to the amount of commissions which he had received, or as to any other point that might be material to the appellant's cause, as your petitioner conceived; nor even the evidence of appellant as to the amount of commissions allowed by the Probate Court, or his desire to perform the administration, although he stated that in the first part of his testimony, yet it was ruled out at last and put in the form of question and answer to show the ruling of the court.

And your petitioner shows that, by these subsequent rulings of the judge, all his evidence was ruled out, so that there was nothing for the jury to act upon. Appellant submits that this court seems to consider that there was some testimony before the jury, and also to lay some stress upon these being only extracts of the record of the Probate Court, when these extracts should be considered as complete copies of the record of the Probate Court, as the judge of

the court below decided that extracts were sufficient, and the defendant did not appeal.

When the appellant tried to obtain his rights on the chancery side of the court, this court referred him to a court of law, saying that all the facts are contained in the records and proceedings of the Probate Court. And upon his going into a court of law and producing said record and proceedings, the judge of the said court refuses to permit appellant to use the said records, thereby leaving your petitioner remediless.

Your petitioner would therefore pray that your Honors, for the causes set forth above, as well as for other causes apparent upon the record, would grant your petitioner a re-hearing in this cause at the next term of this court, or at such other time as may be meet and convenient for the court, and that the same may be placed upon the docket as though it had not been heard or tried, and for such other and further relief in the premises as the nature of the case may require, and as to the court may seem meet; and, as in duty bound, your petitioner shall ever pray.

THE CHIEF JUSTICE delivered the following opinion denying the petition:

The appellant seems to base his petition for a re-hearing upon the assumption that this court entirely misapprehended the case and the contents of the record, and was mislead into commission of errors in its decision.

The first proposition is that "this court seemed to think that the records of the Probate Court of Leon county were evidence before the jury in the court below, whereas they were all ruled out by the judge." This is a misapprehension on the part of the petitioner. What this court seem to think, was that it was uncertain whether the records of the Probate Court were read to the jury, and this uncer-

tainty arose from the reading of the record filed in this court. On the whole, however, we concluded that the records of the Probate Court were not read, because they did not appear in the bill of exceptions, and we were unable to judge what they contained or what they proved.

These probate records, on being offered in evidence, were objected to, not for any valid objection to the records as evidence, but that they should not be received unless copies of them should be filed with the papers in the case, and the court ruled that the records might be read upon that condition. No exception was taken to this ruling, and the records for some reason were not at any time brought before the jury and read. What that reason was I could not understand. Without them, or exemplified copies of them, there was no proof before the court and none was offered, which, if admitted, would prove the plaintiff's case.

The petition states that "the court ruled that certified copies or extracts should be furnished, but when the extracts were produced, defendant objected to the extracts, because they were *extracts* and not the complete *copies*." (Petitioner is mistaken. The court did not rule that "copies or *extracts*" should be furnished, but ruled that certified *copies* should be filed.)

The court overruled the objection, and defendant excepted, but petitioner says that defendant not having appealed, "is not entitled to any benefit from the exception, but it cumbers the record and has a tendency to mislead this court." In my judgment this is a very unnecessary suggestion. There is nothing here so unintelligible that this court has been misled by it, or that has a tendency to mislead.

Petitioner says that the court afterwards refused to allow the "extracts" to be read in evidence, because they were *copies* of the Probate record, and were not signed by Bellamy, "thereby ruling out the entire records of the Probate

Court, upon which appellant's whole cause of action was and is based."

We found, and established our finding upon ample authority, that certified extracts from a particular record were not legal evidence, but that the whole should be certified, so that the court, and not the certifying officer, might judge of the value of the evidence offered. And we think the court should have excluded the certified extracts upon the first ground of objection. The exclusion of the certificates afterwards, for another reason, which may not have been a sound reason, amounts simply to this, that the court decided correctly in excluding the evidence, but gave a wrong reason for the judgment. We do not think a correct judgment or ruling should be reversed because the *reasons* for this ruling are not sound. (Hayes vs. Pope County, 7 Ark., 238; Deland vs. Richardson, 4 Denio, 95; Shepherd vs. Nabors, 6 Ala., 631.) If the exclusion was legal it is of no consequence what the reasons of the judge may have been; it would be absurd to reverse a corerct judgment upon such grounds. And we are reluctantly compelled to say (what should have been sufficiently understood from the opinion already given) that exception should have been taken to the ruling of the court when the original record of the Probate Court was offered, or the plaintiff might have complied with the condition imposed by the court, and offered to file certified copies. In the first event he would have had the benefit of an exception, and in the second he would have had the benefit of the evidence he desired, and "upon which," as petitioner well states, "appellant's whole cause of action was based."

Petitioner further says: "Appellant's next best evidence were the admissions of the defendant as to the amount of commissions received by him, which admissions he made to several persons, and also made under oath in his answer to the suit in chancery," all which were ruled out by the

judge, and this was the only evidence by which he could prove the amount received by the defendant.

Petitoner does not properly designate this as the "*next* best evidence." It was competent evidence, undoubtedly, to show how much defendant had received from the estate for commissions and compensation. The failure to show what had been "allowed," however, (which was absolutely necessary to be shown by the record of the judgment of the Probate Court,) was fatal to the action of the plaintiff. These "admissions" were not the next best evidence, because, the records being present, the admissions were not evidence at all of a judgment allowing compensation to the executors. Proving that a certain sum of money came to the hands of the defendant was of no avail without showing, by legal evidence, that the plaintiff was entitled to some of that money. It made no difference to the plaintiff, therefore, whether the evidence of defendant's admissions was excluded or received so long as they gave the plaintiff no right of action.

Petitioner further reiterates the point raised upon the hearing that the court refused to hear his testimony as to his willingness and readiness to act as an executor. We have already said that his right to compensation rested upon the statute and the fact that he was an executor, duly qualified, and that money had been allowed him by the court, and it is idle to contend that his readiness and willingness to act without some competent evidence that an allowance had been made in his favor, and that the money so allowed had been received by the defendant, could give him a cause of action against the defendant.

He further complains that when he endeavored to obtain his rights in chancery he was remitted to a court of law, and now when he comes into a court of law the Circuit Court refuses to permit him to introduce his legal evidence, and thus he is remediless. In the equity case I said that

the plaintiff's remedy was at law, according to the case made by his bill, but I did not say that he could recover without proving his cause of action by the ordinary course of legal proceedings and by competent evidence. Whether he had any such evidence I do not know, for it has not been exhibited in these proceedings. If the plaintiff is "remediless" thus far, it is because he has not produced the evidence of his right to recover, or has neglected to comply with well established rules in saving his exceptions to the ruling of the Circuit Court in excluding what is claimed to be legal evidence, and presenting such exceptions to this court.

In reviewing this case by the light of the suggestions contained in this petition, we do not discover that we had misapprehended the law or the facts of the case as presented in the record; nor do we find that we had inadvertently or otherwise misapplied the well settled rules of law.

The petition for a re-hearing is denied.

HART'S EXECUTOR, PLAINTIFF IN ERROR, VS. CHANDLER H. SMITH, DEFENDANT IN ERROR.

1. An order authorizing by statute to be made at chambers for the re-establishment of documents destroyed, if made in open court in term time, may be vacated or modified by the court in the same term, the court having entire control of its records and judgments during the term.

2. An irregularity in proceedings before the court, not involving jurisdiction, may be waived by subsequent proceedings of parties, who, knowing the irregularity, act (e. g. under an order irregularly obtained) without making objection or excepting.

3. When it appears that there were two executors against whom judgment was rendered and execution issued, and the execution is de-

stroyed, notice of an application to re-establish the writ, served upon a person as executor of one of the defendant executors and "as such executor of the estate of the first testator," without it appearing that the co-executor of the first testator had died or renounced or been removed, is not such notice as will bind the estate of the first testator or authorize an order re-establishing the lost execution.

4. When one of several executors dies the executorship devolves upon the survivors, and no interest therein devolves upon the executor of the deceased executor, but upon the death of the survivor his executor becomes the executor of the first testator.

Writ of Error to the Circuit Court for Leon county.

The facts of the case are stated in the opinion of the court.

W. C. McCall and *D. W. Gwynn* for Plaintiff in Error.

Angus Patterson and *C. W. Stevens* for Defendant in Error.

THE CHIEF JUSTICE delivered the opinion of the court.

This was an application by petition to the Circuit Court by defendant in error to re-establish a writ of execution issued upon a judgment in his favor against Penelope Hart, executrix, and Edwin A. Hart, executor of James L. Hart, deceased, rendered in the Circuit Court in Madison county, which execution is alleged to have been destroyed by fire. The petition did not show that either of the executors named had died, but notice of the filing of the petition and of application to the judge for an order re-establishing the writ was addressed to and served upon "W. C. McCall, executor of Penelope Hart, deceased, and as such, executor of James L. Hart, deceased."

The judge of the court in Madison, Third Cirucuit, having been of counsel in the case, the proceedings were transferred to the Second Circuit, Leon county.

W. C. McCall having filed an answer denying that he

was ever the executor of the last will and testament of James L. Hart, deceased, and that he had ever administered the goods, &c., of his estate, or in any manner intermeddled with the estate of James L. Hart, appeared and opposed the order prayed for.

Nothing in the petition, notice or proofs showed that the original executrix or executor of James L. Hart, against whom the execution was issued, had died, except that the notice served on McCall addressed him as executor of Penelope Hart, &c., as above stated. The matter was tried in open court, in term, April 2d, 1879, on which day the court ordered that the application be denied, by an order signed and entered in the minutes of the court. On the 4th day of April, in the same term, the attorney for petitioner made a motion for a re-hearing, and that the judgment be opened for that purpose, which motion was "granted on condition that plaintiff give reasonable notice of the time and place of the re-hearing," which order was signed by the judge and entered in the minutes of the court.

Afterward, the judge by an order allowed petitioner to amend the petition by alleging that said Penelope Hart had died "having made her last will and testament, and appointed therein Wilson C. McCall her executor, and your petitioner represents that the said Wilson C. McCall is executor of the estate of James L. Hart, deceased, by virtue of his appointment as executor of Penelope Hart, and has been served with notice as such executor."

McCall filed an amended answer November 18, 1879, reiterating that he had in no manner intermeddled with or administered on the estate of James L. Hart, deceased, nor attempted to do so, and that he had long since filed in the office of the Probate Court of Madison county in said State, from which court the letters of executorship of this defendant issued, a renunciation of any right and all intention to act or become the executor of the estate of James

L. Hart, deceased." The renunciation appears to have been filed in the Probate office after the commencement of this proceeding.

Afterward, on the 17th January, 1880, upon more than ten days notice, and after hearing both parties, the judge at chambers, upon consideration of the petition and answer, made an order that the execution be re-established, and that the copy on file shall have the same validity as the original.

To this order McCall excepted and took a writ of error

Plaintiff in error seeks to reverse the order of the judge upon the following grounds:

That the order of April 2, 1879, refusing the petition, was a final order and judgment, and that the order of April 4 having been made without notice to respondent, was irregular and void.

That the order of April 2 has not been set aside or annulled.

That neither the original nor amended petition shows that either Penelope Hart or Edwin A. Hart was dead at the the time of filing the original petition.

That Edwin A. Hart, as surviving executor, should have been made a party to the proceeding, and the only party defendant, as it does not appear that he is dead.

That there were no competent parties defendant before the court.

That there was no issue upon the answer of defendant McCall, and no evidence connecting him with the estate of James L. Hart, deceased.

It was urged upon the argument that the proceeding to re-establish this writ was had under the provisions of chapter 3019, of the laws of 1877; that by section 4 of that act the issues "shall be tried by that judge at chambers;" and the order or judgment having been made, no motion to vacate it could be lawfully entertained except upon ten days notice, as provided by chapter 3001, laws of 1877.

But the order of April 2, 1879, was made in open court, in term time, and having been so made, and the court having power over its records and judgment during the term, it was competent for the court to open or set aside this order upon motion of parties or *sua sponte,* in the same term, and to order a further trial or hearing. After this order for a new hearing the amendment of the petition alleging the death of Penelope Hart was made, due notice was given that the matter would be heard at a time and place designated, and McCall appeared and put in a further answer to the petition, as already stated, without objecting to the further hearing, but proceeding to a trial of the issues formed by the petition and answer as amended.

If there was any irregularity in these proceedings, not affecting the jurisdiction, it was waived by appearing and proceeding without objection to the same, and no objection can be entertained after judgment upon any ground so waived.

It appears that upon this new hearing the judge made the order re-establishing the execution by the copy presented with the petition, upon the notice to McCall, as executor of Penelope Hart. McCall denies that he is the executor of James L. Hart, by reason of having been appointed executor of the estate of Penelope, or that he has acted as such.

It is alleged that the judge erred in making this order as against him or upon notice to him, because it does not appear that Edwin A. Hart, the co-executor of Penelope, was dead, or that he had been removed or discharged before the death of his co-executrix.

It is an established rule that when one of several executors dies, no interest in his executorship is transmitted to his own executor, and the whole representation survives to the remaining executor, and to the executor of such sur-

vivor upon his death. 1 Lomax on Executors, 2 ed., 176; 1 Williams on Executors, 255.

As it does not appear that Edwin A. Hart, (who, as co-executor of James L. Hart, is one of the defendants in judgment upon which the alleged execution was issued, and against whom it was issued,) was dead, and as nothing appears in the proceedings upon which even a presumption of his death or of his removal or renunciation can arise, it cannot be concluded that the executorship of Penelope Hart, in the estate of James L. Hart, fell upon McCall as her executor, but the only presumption is that Edwin A. Hart survives, and that he is the surviving executor of the estate of James L. Hart.

It follows that there was no evidence before the court connecting McCall with the estate of James L. Hart, that the notice to him gave no ground for this proceeding and the estate is not bound by it, McCall being a stranger to that estate. There can be no power to grant the order without due notice to a proper representative, under the act of 1877, chapter 3019. The record fails to show that the court had jurisdiction from the beginning, and the order and judgment of the court or judge appealed from must be vacated and set aside, without prejudice to the rights of the parties as to new proceedings.

It is unnecessary, in view of this conclusion, to consider the question of the renunciation by McCall. If Edwin A. Hart survived Penelope, the renunciation was nugatory.

In any event it cannot be considered evidence as against the estate of James L. that Edwin A. was dead.

Judgment reversed without prejudice to other proceedings, with costs against defendant in error.

FRANK P GALE, ET UX., VS. ZACHARY T. HINES, ET UX.

1. Ejectment will lie between co-tenants in cases where the co-tenant has been guilty of such a violation of the plaintiff's rights as constitutes an ouster.

2. A declaration conforming to the requirements of chapter 999, laws, is sufficient in such case if it describes the undivided interest of the plaintiff. An allegation of an exclusive possession by defendant, amounting to a denial of the right of the co-tenant plaintiff, is not necessary. This can be put in issue by the plea of the general issue.

Appeal from the Circuit Court for Madison county.

The facts of the case are stated in the opinion of the court.

Pasco & Palmer and *C. W. Stevens* for Plaintiffs in Error.

A. Paterson for Defendants in Error.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

This is an action of ejectment by Gale and wife against Hines and wife for an undivided half interest in certain lands described in the declaration. To the declaration the defendants demurred, setting up as grounds of demurrer:

First. That ejectment cannot be maintained for an undivided interest in land.

Second. That a tenant in common cannot maintain ejectment against his companion, nor against the lessee of his co-tenant.

Third. That one joint tenant parcener, or tenant in common, cannot maintain an action of ejectment against his co-tenant without an actual ouster.

There was judgment for the defendants upon the demurrer and the plaintiffs appealed.

It is well settled that ejectment will lie between co-tenants in cases where the defendant has been guilty of such a violation of the plaintiff's rights as constitutes an ouster.

There are some of the cases which declare in general terms that ejectment may be thus maintained, though no actual ouster be proved. (15 John., 501; 2 Dana, 111.) Upon examination with care, however, it will be found that the apparent difference results from the different definition of the term ouster. When it is said that it is not necessary to prove an actual ouster, it is meant that no actual expulsion by force is necessary to be proved. An exclusive possession, connected with some act amounting to a denial of the right of the co-tenant out of possession, is enough. 10 Wend., 419; 32 Cal., 499; 8 Humph., 668; 5 Mass., 351; 5 Green, 482; 21 Conn., 385; 10 Leigh, 457.

We have no doubt that ejectment will lie for an undivided interest in land, or that one tenant in common may, in proper cases, sustain the action against his co-tenant. The first and second grounds of demurrer are, therefore, we think, not well taken. As to the third ground, it is true that the action cannot be maintained without *"an actual ouster;"* but this does not mean an actual expulsion by force. Every ouster is an actual ouster, whether it be the result of positive expulsion, or whether it results from exclusive possession accompanied by such acts or facts as amount to a denial of the right of the co-tenant out of possession.

The only remaining question we see here is whether it is necessary, under our statute, for the co-tenant in his declaration to allege the ouster. The statute prescribes a form for all actions of ejectment. The old fictions accompanying the action are abolished, and the plea of not guilty puts in issue the title. In actions of ejectment, other than between tenants in common, there can be no ground upon which an ouster can be required to be alleged in the declaration.

If we do so require, then we are certainly requiring something more at the hands of plaintiffs in framing declarations in ejectment than the statute requires or contemplates. The practice, and we think it correct, now prevailing in the State is to frame the declaration under the requirements of this act, and we can see nothing in the relations of tenants in common to cause us to vary the rule of pleading prescribed by the statute when the action is by them. Even anterior to this statute the rules of special pleading did not, in all respects, prevail in ejectment. Many of its incidents were fictitious and peculiar. Except pleas *puis darrein continuance* or pleas to the jurisdiction the plea as a general rule was the general issue, (Tyler on Ejectment, 464,) and the consent rule admitted lease entry and ouster, (except where the action was between tenants in common, &c., when it confessed only lease and entry,) and the general issue denied the defendant's possession as well as plaintiff's title. Now, it is not denied that the plea of the general issue, under the statute, puts all this in issue in cases other than actions between co-tenants, and where is the reason for a distinction as to them?

The judgment is reversed, and the case will be remanded for further proceedings according to law.

HUOT, KELLY & CO., APPELLANTS, VS. ELY, CANDEE & WILDER, APPELLEES.

1. A garnishee must not only have actual possession of defendants' property, but there must be, except in cases of fraudulent dispositions, privity, express or implied, of contract and interest between the garnishee and the defendant, by which the defendant would have a right of action, or an equitable claim against the garnishee to re-

cover the property for his own use, either at the present or some future time.

2. The maker of a negotiable note should not be charged as garnishee of the payee while such note is current, unless it appears that the garnishee has it in his own possession and under his own control.

Appeal from the Circuit Court for Nassau county.

The facts of the case are stated in the opinion of the court.

J. M. and *H. J. Baker* for Appellants.

D. M. Hammond and *L. I. Fleming* for Appellees.

MR. JUSTICE VANVALKENBURGH delivered the opinion of the court.

On the 3rd day of March, 1874, Ely, Candee & Wilder commenced an action against one Louis Sylvester, claiming to recover $2,000. On the same day a writ of garnishment was issued against the appellants, Huot, Kelly & Co., requiring them to set forth what goods and chattels, rights and credits, money or effects, they had in their hands, custody or control belonging to the said Louis Sylvester, and in what sum they were indebted to him. Huot, Kelly & Co. answered that they had no goods, chattels, rights, credits, money or effects in their hands or custody, or under their control, belonging to the said Sylvester at the time of the service of the said garnishment; but answered that on the 8th day of September, A. D. 1873, they made a promissory note whereby they promised to pay, twelve months after its date, to the said Louis Sylvester, or his order, the sum of sixteen hundred and fifty-five 97-100 dollars. That said note was unpaid and had several months to run before its maturity. That they had no knowledge as to who was the holder of the said note, but that about the time of the service of the notice of garnishment upon them the note was

still in the possession of the defendant, Sylvester. The plaintiffs below traversed the answer of Huot, Kelly & Co., the garnishees, and allege that on the said 3rd day of March, 1874, the said garnishees were indebted to said Louis Sylvester on the note mentioned in their said answer, and that the said note for the sum of $1,655.97-100 was in the possession of one D. M. Hammond for the defendant, Sylvester, and was on the 6th day of March, 1874, delivered up on the order of the defendant, Sylvester, to Patrick Kelly, one of the firm of Huot, Kelly and Company, in the store of, and in the presence of, the said garnishees, with the understanding that the garnishees stood security for the defendant, Sylvester, to release the attachment and garnishment in this cause; that they failed to carry out the arrangement.

On the 16th day of May, 1874, a judgment was recovered and entered against the defendant, Louis Sylvester, in favor of the plaintiffs, Ely, Candee & Wilder, for the sum of $1,700.35.

This cause against the garnishees was tried on the 29th of October, A. D. 1878, and a verdict was given for the plaintiff. Whereupon it was ordered that judgment be entered in favor of the plaintiffs, Ely, Candee and Wilder, against the garnishees, Huot, Kelly & Co., for the sum of $2,185.85.

The counsel for garnishees moved the court for a new trial for the reasons:

1. "That the verdict was contrary to the evidence, and contrary to the law."

2. "In that the court erred in charging the jury in effect that the peculiar circumstances of said cause constituted an exception to the general rule, that the maker of negotiable paper cannot be garnished, before maturity of the same, or made liable thereby."

3. "That the jury assessed a large amount of interest and

allowed what accrued and became due long subsequent to the service of said garnishment, and the answer of said garnishees, and which was not due and owing at the time of the service of the answer, and for which the garnishees are not liable.

This motion was heard on the 17th April, 1879, and was denied by the court, and judgment was rendered against the garnishees for $2,185.85.

To this opinion and judgment of the court the garnishees, Huot, Kelly & Co., by their counsel duly excepted.

From this judgment the garnishees bring their appeal and assign the following errors:

1. The court erred in refusing to charge "that if it appeared that the note was held by an individual partner as a personal security or collateral, that such was not the possession of the firm, and the garnishees as a firm would not be liable."

2. The court erred in charging, that a negotiable paper, before maturity, would under some circumstances be the subject of garnishment.

3. The court erred in allowing a large amount of interest to be assessed, which accrued subsequent to summons in garnishment, and on notes which were not proven.

4. That the court erred in overruling the motion of defendants to set aside the verdict of the jury and for a new trial.

It can hardly be claimed that this note, while in the hands of Mr. Hammond for the benefit of Mr. Kelly, to secure him against liability on his individual bond as security in the replevin suit, was under the control or in the possession of Huot, Kelly & Co., nor would the fact of its delivery to Mr. Kelly himself, by Mr. Hammond, upon the written order of Sylvester after the writ of garnishment had been served, entitle the garnishees to the possession or control of the note. There was an arrangement made be-

tween Sylvester and Kelly, as a private individual, not as a member of the firm of Huot, Kelly & Co., that Kelly should become surety on a replevin bond, and this note against the firm of which he was a member was to be held to secure him against loss or damage by reason of his becoming such security. It does not appear from the evidence or in any manner in the record, that the suit in which the replevin bond was given is not still pending, nor does it appear but that Mr. Kelly is still liable upon that bond. The garnishees allege in their answer that they had no knowledge as to who was the holder of said note, but they also allege that about the time of the service upon them of the notice of garnishment the note was still in the possession of the defendant Sylvester. They further say that "they had no goods, chattels, rights, credits, money or effects in their hands, or custody, or under their control, belonging to the said Sylvester at the time of the service of the said garnishment."

But one person, Mr. Hammond, who was the person holding the note for the benefit of Mr. Kelly, was examined upon the trial of this cause, and he testified as follows: "That Patrick Kelly, of the firm of Huot, Kelly & Co., was heretofore surety on a replevin bond, in a certain suit instituted in said county by Ely, Candee and Wilder against John Hoffman for the recovery of certain machinery in a saw mill at Fernandina, Florida, possession of which was at the time of said suit held by said Hoffman, but who had sold the mill to Louis Sylvester. That sometime thereafter, in the year 1873, the saw mill before mentioned was purchased by Huot, Kelly & Co., from Louis Sylvester, while said replevin suit was yet pending, and that Huot, Kelly & Co., in part consideration therefor, executed and delivered to Louis Sylvester their promissory note for sixteen hundred and fifty-five dollars and ninety-seven cents, payable twelve months after date, and dated

the 8th day of September, 1873. That by agreement between Louis Sylvester and P. Kelly, the surety on the replevin bond, (aforesaid in the Hoffman suit,) the said note of Huot, Kelly & Co. was placed in the hands of D. M. Hammond to hold to indemnify P. Kelly in event of loss to him in consequence of said replevin suit, and that the note was so accepted and held by Hammond. That about that time a suit of attachment was commenced by Ely, Candee and Wilder against Louis Sylvester, and a stock of merchandise owned by Sylvester was attached, and at the same time, to-wit: on the third day of March, 1874, a writ of garnishment was issued in said cause, out of the Circuit Court, and served on Huot, Kelly & Co. That Sylvester, desiring to procure a bond for the release of the goods, applied to Huot, Kelly & Co., to sign it as surety, which they I believe consented to do on consideration that the note in question should be delivered to them as collateral, which arrangement was assented to, but the bond was never signed by Huot, Kelly & Co., and the goods were not replevined. Sylvester about that time sent a written order to him, Hammond, (the holder of the note to indemnify Kelly as aforesaid) requesting him to deliver it to Mr. Kelly. Mr. Kelly brought the order for the note, and the note was delivered to Mr. Kelly, by authority of the order from Sylvester, about three days after the service of the writ of garnishment on Huot, Kelly & Co. The note was a negotiable note and was not due at the time it was delivered to Mr. P. Kelly, and did not mature until the 8th of September, following, about seven months." On his cross-examination, he testified that he "was told by Mr. Kelly that the note was placed by him in the desk, in the store of Huot, Kelly & Co., and was taken out and carried off by Louis Sylvester. He did not deliver it to him. The note was afterwards negotiated before maturity, and is now held in New York, and a suit pending on it against Huot, Kelly & Co."

We cannot see how, upon the answer of the garnishees and this evidence presented upon the trial, the plaintiffs were entitled to recover. At the time of the service of the notice of garnishment the note was in the possession of Mr. Hammond as collateral to the liability of Kelly on the bond, and was subsequently transferred to Kelly's own hands and did not pass into the possession of the garnishees. The counsel for the garnishees requested the court to charge the jury that if they found from the evidence that the note in question had been delivered by Huot, Kelly & Co. to Sylvester prior to said garnishment, and was held at the time said garnishment was served by Mr. Kelly, a member of said firm, to indemnify him individually against loss on a bond signed by Mr. Kelly individually as a security for Sylvester, then the note was not within the possession or custody of the firm, and the firm could not be held liable by virtue of said garnishment. The court declined so to charge. An exception was taken, and this is made the first ground of error upon the part of the appellants.

The rule in regard to the possession with reference to privity of contract and of interest between the garnishee and defendant is, that the garnishee must not only have actual possession of the defendant's property at the time, but there must be, except in cases of fraudulent dispositions of property, privity, express or implied, of contract and interest between the garnishee and the defendant, by which the defendant would have a right of action or an equitable claim against the garnishee to recover the property for his own use, at the present or some future time. Drake on Attachment, §485.

If the note was not in the possession of, or in the custody and control of, Huot, Kelly & Co., under an arrangement by and with the defendant, Sylvester, so that there was privity of contract and interest between them by which the defendant would have his right of action, the plaintiffs

were not entitled to recover, and the request of the counsel of the garnishees that the court so charge the jury should have been complied with.

The second assigned error is, "that the court erred in charging that a negotiable paper before maturity would, under some circumstances, be the subject of garnishment." It does not appear that the court so charged. The language of the charge, as it appears in the bill of exceptions, is, "as a general rule the maker of a negotiable promissory note cannot be bound by garnishment in a suit against the payee named in said note." This, we think, is the correct general rule. The maker of a negotiable note should not be charged as garnishee of the payee while such note is still current, unless the garnishee has it in his possession or under his control. In the case of Stone vs. Dean, 5 N. H., 502, the court says: "It has always been considered as settled in this State that a trustee who has given a negotiable note to the principal cannot be charged as a trustee on account of such note. The reason of this rule is founded upon the negotiable quality of such note. If the trustee could be charged in such a case, then it might happen that either a *bona fide* purchaser of the note must lose the amount of it, or the maker, without any fault on his part, be compelled to pay it twice. To avoid such a dilemma the rule was established. But in this case, when the process was served upon the trustee, he had the notes he had given in his own hands and under his own control; and these notes could not be transferred to any other person in the ordinary course of business while he held them, nor can he be held to pay them again if he shall be charged in this suit on that account. The reasons on which the rule is founded do not then appear to exist in this case." In that case the trustee was charged with the amount of his own notes. See Hinsdill vs. Safford, 11 Vermont, 309; Hutchins vs. Evans, 13

Vermont, 541; Myers vs. Burman, 9 Iredell, 16; Carson vs. Allen, 2 Chandler, 123; Drake on Attachments, §588, 589.

For the reasons assigned the judgment must be reversed and a new trial awarded.

THE SOUTHERN EXPRESS COMPANY, APPELLANT, VS. DOCTOR SAMUEL VANMETER, APPELLEE.

1. An express company belongs to that class of carriers who undertake to make a personal delivery of the goods to the consignee. It is held to great strictness in the performance of this duty. Such company, although it may not have been the first carrier to which the package was delivered, yet if its line extends to the point of destination, and it receives the package, its duty is to make personal delivery in accordance with the address on the package, and if it is delivered elsewhere than as addressed, or to a wrong person, the company is liable for a consequent loss. In this case a party forged a telegram in the name of another person, requesting a national bank to forward to Gainesville, Florida, five hundred dollars to this other person; upon the telegram being received, and the agent of the other person giving his note for the money (which was subsequently paid,) the national bank forwarded the money as desired by express. The express company delivered it to the sender of the telegram. The agent making the delivery knew that the party was a stranger who had just arrived in town. The keeper of the hotel, with whom the stranger lodged, called with the stranger for the package and treated him as the party to whom it was addressed, but there was no identification or request by the agent for an identification: *Held,* That while the hotel keeper may have been a person known to the agent as a man worthy of trust and confidence, the company was liable for the loss occasioned by the delivery to the wrong person.

2. The judge having refused to give instructions asked for by the defendant, and having given oral instructions, subsequently and before the jury retired gave the jury written instructions offered by the plaintiff, saying to the jury that the written instructions thus

given were substantially the oral instructions he had given, and that he adopted them as the instructions of the court. This is a ocmpliance with the statute (chapter 2096, laws,) requiring charges in cases of this character to be wholly in writing.

3. If the charge given by the judge covers the entire case, and submits it properly to the jury, he may refuse to give other instructions.

4. A party cannot, by his silence in the Circuit Court, waive the failure of the judge to put his instructions in writing, or to sign and seal them, or to do other things of this character; and after having had his chance before the jury, urge upon a motion for a new trial, qr here, for the first time, the omission as error; he must except before the jury retires. The case of Baker vs. The State, 16 Fla., 410, explained.

5. Chapter 2096, laws, is a revision of the statutes regulating charges to juries; it covers all cases, civil and criminal; it repeals section 8 of the act of January 4, 1848, chapter 138, laws, and all of the act of January 3, 1848, chapter 140, laws.

6. If the instructions of the court are signed and sealed by the judge, they became a part of the record; but in order to review here any exception taken to them, the exception must be authenticated in a proper manner by the bill of exceptions, embracing so much of the proceedings upon the trial as is necessary for the consideration of the exception taken.

7. Counsel filing a brief as to one only of his assignments of errors, and failing to embrace in his brief anything else, abandons the other errors assigned, and, as a matter of right, cannot require this court to consider them.

8. That the judge permitted leading questions to be asked a witness is the exercise of a discretion not reviewable in this court upon writ of error.

Appeal from the Circuit Court for Alachua county.

The facts of the case are stated in the opinion of the court.

T. F. King for Appellant.

The appellant refers the court to Laws of Florida, 1877, page 42, 43; 17 Fla., page , to sustain the last ground in their assignment of errors.

R. Fenwick Taylor and *R. W. Davis* for Appellee.

The assignments of error are herein quoted and replied to:

ERROR 1. "The court below erred in allowing the plaintiff to introduce the depositions of Charles Clarey, (instead of John Coyne, as assigned,) who was examined by interrogatories as a witness for the defendant before refusal on the part of the defendant to introduce the same." The case of Broughton vs. Crosby, reported at page 254, 255, 9 Fla. Rep, settles this point conclusively in *favor* of the ruling of the court below.

ERROR 2. "The court erred in allowing the third direct interrogatory, and the answer thereto of J. Huff, which question was to the point, whether I. M. Cox, the agent of the Express Company, had demanded of the *pseudo* Dr. VanMeter, any identification before his delivery of the express package." "If the question relates to introductory matter, calculated to draw the mind of the witness to the subject of inquiry, the objection to the leading character or form of the question is captious, and is never tolerated even if it be leading." See Vol. 2, Phillips on Evidence, page 724; 4 Wendell, 427; 1 Vol. Greenleaf Evidence, §434. And even if this interrogatory was illegally leading, the question which followed immediately after it to the witness Huff elicited from him the same fact and is not objectionable and is not objected to as being leading.

ERROR 3. "The court erred in allowing the 5th direct interrogatory to Huff." The objection is clearly captious for the same reasons given above, and in no sense can it be construed to suggest the answer desired of the witness, as his answer to it clearly shows.

ERROR 4. "The court erred in allowing the 6th direct interrogatory to Huff, because it asks of witness as to book entries, the books themselves not being produced and they being the best evidence." This objection carries captious-

ness on its face. By examining this interrogatory it will be seen that none of the *contents* or entries in the books are inquired about; the witness was simply asked as to the *fact* whether he, (the witness,) had ever *examined* the books.

ERRORS 5 and 6 are both captious objections with no real merit in either of them. As to the real merits of the case, they do not effect anything, whether they were or were not allowed by the court.

ERROR 7. "The court erred in refusing the written instructions asked for by defendants." The court below could not consistently have given these instructions to the jury after having instructed the jury upon the written charges asked for by the plaintiff, and given by the court to the jury, as the two sets of instructions, those given to the jury and those refused to be given, are diametrically opposed to each other as principles of law.

ERROR 8. "The court erred in giving to the jury the written instructions asked for by the plaintiff." That the court below did not err, see the following authorities: Hutchinson on Carriers, pages 274, 275, §343 and 344; McEntee vs. N. J. Steamboat Company, 45 N. Y., 34; Rogers vs. Weir, 34 N. Y., 463; Alexander vs. Southey, 5 B. and Ald., 247; Ball vs. Linny, 48 N. Y., 6; Hutchinson on Carriers, §§347, 348, 349, 350; The American Express Company vs. Fletcher, 25 Indiana Rep., 492; American Express Company vs. Stack, 29 Indiana Rep., 27; Gosling vs. Higgins, 1 Camp., 451; Lubbock vs. Inglis, 1 Stark., 104; Powell vs. Myers, 26 Wendell, 591; Hawkins vs. Hoffman, 6 Hill, 586; American Merchants Express Company vs. Milk, 73 Illinois, 224; Devereaux vs. Barclay, 2 B. and Ald., 702; Guillaum vs. Packet Company, 42 N. Y., 212; Angle vs. Railroad, 18 Iowa, 555; Willard vs. Bridge, 4 Barb., 361; Claflin vs. Railroad, 7 Allen, 341.

As to delivery by express companies: See Hutchinson

on Carriers, §379; Baldwin vs. American Express Company, 23 Illinois, 197; American Union Express Company vs. Wolf, 79 Illinois, 430; American Union Express Company vs. Schier, 55 Illinois, 140; Marshall vs. American Express Company, 7 Wisconsin, 1; Sullivan vs. Thompson, 99 Mass., 259; Packard vs. Earley, 113 Mass., 280; Witbeck vs. Holland, 45 N. Y., 13, 55 Barb., 443; Southern Express Company vs. Armstead, 50 Ala., 350; American Express Company vs. Robinson, 72 Penn. St., 274.

As to the liability of the defendant, they being proved by their own witness, I. M. Cox, (see his testimony,) to have been the *last transporters in possession* of the package sued for, and the ones who brought it to its destination, and who there *wrongfully delivered* same: See Hutchinson on Carriers, §149 and 150; also Nutting vs. Railroad, 1 Gray, 502; Darling vs. Railroad, 11 Allen, 295; Perkins vs. Railroad, 47 Maine, 589; Illinois Central R. R. vs. Cowles, 32 Ill., 116; Anchor Line vs. Dater, 68 Ill., 369; C. & N. Ry. Co. vs. The Packet Company, 70 Ill., 218; Barter vs. Wheeler, 49 N. H., 9; Southern Express Company vs. Hess, 53 Ala., 19; 31 Wisconsin, 619.

ERROR 9. "The court below erred in refusing to grant the motion for a new trial." This error, (if error it be,) includes all the other errors assigned, and is fully answered in answering the others. Counsel for appellee would here, however, call the attention of this honorable court to the fact, as an evidence that the failure of the court below to *seal* and *file* the instructions asked for by the plaintiff and defendant was *not* excepted to or questioned on the trial; that in this motion for a new trial no allusion is made to the court's failure or error in this respect and it is not made one of the grounds of the motion for a new trial. See motion for new trial.

ERROR 10. "The court erred in giving oral instructions to the jury, and in not *sealing* and *filing* the instructions

given in writing; also, in not declaring in writing to the jury his ruling on the instructions presented by defendant's attorney," &c., &c. The *true* record in this cause does not sustain the position assumed by the defendant in this assignment of error. The record shows that the error of the court below, in giving oral instructions to the jury, was at once corrected at the trial by giving to the jury the written instructions asked for by the plaintiff, which the court adopted as its own and as being substantially what had been given orally, and so stated to the jury. In other words, the written instructions asked for by the plaintiff, and which were given and read by the court to the jury, were but a repetition of the oral charges already given, and cured the error committed in the giving of the oral charge.

It is true that the instructions given, and those refused to be given, do not appear to have been *sealed* or *filed* by the court below; but no objection was raised at the trial on these grounds, and no exception was asked to be noted to the charges of the court on these grounds or for these reasons during the trial of the cause, so as to give the court and the plaintiff an opportunity to correct them in these merely formal essentials. And it is too late now, so long after the trial, to assign these objections as error. See 6 Fla., 306.

And to show that these objectionable features of the court's instructions to the jury *were not* excepted to during the trial, we respectfully call the attention of this honorable court to the fact apparent in the bill of exceptions and record in the cause, that the first and second charges or instructions asked by the defendant to be given to the jury were in fact given to the jury by the court below, and no exception is taken and no error is assigned for the giving of these two charges, although the same technical objection applies to them, viz: they were not *sealed* or *filed* by the

court; and again, no mention of this error is made in the defendant's motion for a new trial in the cause, which shows that these objections were an after-thought with the defendant.

"Whilst then several of the instructions given to the jury have been found erroneous, yet the inquiry arises as to the finding, and whether the judgment should be reversed on account of them. The rule is that there must be some possibility of injury arising out of the matter excepted." 2 Hill, N. Y., 210; Cowen & Hill's Notes to 1st Phil. Evidence, 787-8.

"When the jury have given a correct verdict it will not be set aside for erroneous instructions of the court, when instructions correctly given on those points could not have changed the result." Hill vs. Calvin, 4 How. Miss. R., 231.

"Tested by these rules, we are of opinion that the verdict is fully sustained by the evidence; that it is right upon the law and facts of the case, and cannot perceive that the erroneous instructions given can have induced to any injury in the case," is the language used by this honorable court in the case of Daggett vs. Wiley, reported in 6th Fla. Rep., 515.

Exclude the whole testimony of Huff, the witness whose testimony seems to be objectionable to the appellant, and then take the case that is made by the testimony of the witnesses for defendant, and by the testimony of those witnesses for the plaintiff whose testimony is not objected to at all; and then compare that case thus made with the two cases that follow, and it will at once appear most clearly that the verdict of the jury in this case was *inevitable*, and was correct and in accordance with law, and should not be reversed by reason of the captious and technical objections raised by the assignment of errors herein.

In the American Express Company vs. Fletcher the facts were, "that a person claiming to be J. O. Riley applied at

the office of a telegraph company to have a message sent, signed J. O. Riley, requesting a remittance of a considerable sum of money to his address. The message was accordingly sent, and the money forwarded by an express company as carrier, as requested, and received by the agent of the company at the place from which the message had been sent, who was also the operator for the telegraph company who had sent the dispatch, and was paid over by the agent to the person who had sent the message, but who turned out to be a swindler. It was held that the Express Company was liable for negligence in delivering the money without further proof of his being the party entitled to it than the mere fact that he had sent the dispatch, in response to which the money had been received. The case is silent as to whether there was a real J. O. Riley, but we are to assume that there was; otherwise, the money would not have been sent to that address. It must have been intended for a real J. O. Riley, and delivered to one who assumed that name for the purpose of fraud." See 25 Indiana, 492, for the above case.

And again in the same court, in a subsequent case, the carrier was held liable under still more exculpating circumstances:

"A person, knowing as it seems by some means that there were goods in the possession of the wife of one James Stack, who was absent from her, which, by falsely personating the husband, he might induce her to forward to his address, telegraphed to her in the name of her husband to send them to his address. Being completely deceived, she sent the goods by the Express Company as carrier, as directed, at the same time writing a letter addressed to James Stack at the same place to which the goods had been forwarded, informing him that they had been sent according to his directions. This letter came to the hands of the swindler as he had arranged that it should do. He then demanded

the goods of the company, showing this letter and describing the goods, which were contained in a package, as proof that he was the genuine James Stack. The delivery of the goods was, however, refused, and he was required to adduce further evidence of his identity with the real James Stack, for whom the goods were intended. This he did by a person known to the agent of the company, who stated the man's name to be James Stack, as he really thought it was. Without further inquiry the agent delivered the goods. It turned out that this man was not the real James Stack to whom the goods had been sent. The delivery under such circumstances was held to have been *inexcusable* negligence." See this case reported in 29 Indiana, page 27.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The first question which we examine in this case is raised by the last assignment of error.

The defendant asked the court to give twelve instructions. The court ruled as follows:: "All but the first and second of these instructions refused. The first and second given." The record then continues: "Defendant's attorneys excepted to the ruling of the court, excepting as to first and second." Then follows this recital in the bill of exceptions: "The court then gave oral instructions to the jury, saying he would afterwards reduce his instructions to writing." The plaintiff's attorney asked the court to give instructions to the jury, which the judge read and gave to the jury, saying "they were substantially the instructions he had already given to the jury, and adopting them as the instructions of the court." To the instructions of the plaintiff thus given the defendant objected and excepted in language as follows: "We object to the instructions and

except thereto to each and every instruction given by the judge as being contrary to law."

The error assigned upon this record is as follows: "The court erred in giving oral instructions to the jury, and in not sealing and signing the instructions given; also in not declaring in writing to the jury his ruling on the instructions presented by defendant's attorneys and refused by the court, and in not pronouncing the same to the jury as refused."

Examining carefully the exceptions taken in the Circuit Court, during the trial, to the instructions, it will be seen that none of these grounds are there urged against them; and the first question which arises is, was it not the duty of defendant's counsel to except to the charges there, upon the grounds now urged here, and whether failing so to do he has not waived the error, if error there was?

We think the rule in a case of this character is that a party cannot, by his silence in the Circuit Court, waive the failure of the judge to put his instructions in writing, or to sign and seal them, or to do other merely formal acts of this character, and after having had his chance before the jury, urge upon a motion for a new trial, or here, for the first time, the omission. 16 Fla., 368.

In criminal cases under the statute of January 4, 1848, Chap. 138, this court has repeatedly held that the failure of the judge to reduce his charge to writing, and, as written, to give it to the jury was error, and that without an exception. (9 Fla., 517; 13 Fla., 649; Long vs. The State, 11 Fla., 299.) This followed because the statute expressly provided that a failure to reduce the charge to writing in "all criminal cases," should "be deemed and construed to be error, from which a writ of error might be prayed as of right."

I do not understand such to have been the ruling as to charges in civil cases, as to which there was no such pro-

vision of the statute. The duty of the judge in the matter of giving instructions in civil cases was, anterior to the statute of 1877, Chap. 2096, Laws, defined by Chap. 140, Laws, which contained no such provision as that contained in the act regulating proceedings in criminal cases, whereby a failure to reduce the charge to writing was to be deemed and construed to be error, from which a writ of error might be prayed as of right.

Chapter 140, Laws, was examined by this court first in the case of Doggett vs. Jordan, 2 Fla., 551. Upon reference to that case it will be found that "exceptions were taken to the whole of the charge, and that an important portion of it" (the charge) "does not appear." The Circuit Court in that case had not reduced to writing and incorporated in its charge what it instructed the jury as to the law of partnership, and such action was excepted to on the ground of this omission. In the case of Friedenburg vs. Robinson, 14 Fla., 145, which was a civil case, the judge refused the instructions as asked for, but after making interlineations, expressing with the original text his views of the law, he gave them. To this refusal, and to this interlineation, the defendant excepted. There was, therefore, here an exception which properly brought the matter to the attention of the Circuit Judge upon the motion for a new trial, as well as to the intention of this court upon the appeal. We can find no civil case where the question as to the necessity for an exception in such case was raised and expressly decided. These cases, in which the matter was considered, show that an exception was taken. With this brief review of the civil cases arising under the statutes stated, we come to the consideration of the act of March 2, 1877, Chap. 2096, Laws.

After a careful examination of its provisions we feel satisfied that it was a revision of the acts of 1848, Chaps. 138 and 140, so far as they relate to charges or instructions

given by the court in civil and criminal cases, and that section 8 of the act of January 4, 1848, and the entire act of January 3, 1848, are repealed. The first section of Chap. 2096 prescribes the general rule as to charges embracing both subject-matter and form, in all cases, civil and criminal. The second section, which is really nothing more than a proviso to the first, limits the general rule requiring written charges prescribed in the first section.

It authorizes oral charges in all appeals from justices of the peace, and in all criminal cases other than capital felonies, unless request is made for written instructions as therein authorized. This request is to be made before the evidence is closed, the purpose being to give the judge time to prepare the instructions in writing. The instructions of the court should therefore be in writing, as required by the first and third sections, in all capital cases, and in all civil cases not being appeals from judgments of justices of the peace.

The act of January 3, 1848, being repealed, as we think, by the act of March, 1877, so much of the act of January 3, 1848, as requires a charge to be written out before it is delivered, and to be delivered as written, ceases to be operative.

In this case, by reference to the recital in the bill of exceptions, it will be seen that the judge did deliver oral charges to the jury; that no exception was taken to them upon this ground, and that the judge subsequently adopted written instructions offered by the plaintiff, saying "they were substantially the instructions already given." The instructions given, therefore, upon which the jury had a right to rely, and which were announced as the law to control them, were reduced to writing, and thus delivered. There was, therefore, in our view, a complete compliance with the statute of 1877, so far as it requires written instructions. The instructions, as given and received by the

jury, were, within the meaning of the statute, wholly in writing. From an examination of the recitals of the bill of exceptions, as quoted, it will be seen that no exception was taken during the trial to the instructions refused or given in this case upon the ground that they were not sealed and signed by the judge. So far as the requirement to file them immediately after were delivered is concerned, that was done. The statute requires that the instructions shall be signed and sealed by the judge, and be by him filed in the case, "and form a part of the record in the case." It might be contended that the instructions in this case, not being thus filed and sealed, constituted no part of the record; but we do not think such is the case. If neither party in the case requires or requests the judge to comply with this technical formality and thus waives it, it does not prevent him from objecting upon other grounds, making the instructions and his exceptions thereto a part of the bill of exceptions. The parties have a right to waive the formal requirement. If they do not except upon that ground, but let the case go to the jury upon unsealed instructions as to the law, at the same time taking other exceptions, they will be held to waive the signing and sealing; and yet, if they have exceptions upon other grounds, and their exceptions and the charge are made a part of the record by bill of exceptions, and such of the testimony as is necessary is embraced in the bill of exceptions, they will be heard upon appeal to this extent. As a matter of course, upon an exception on the ground that the charge is not signed and sealed, or upon like grounds, the judge may rectify his mistake before the jury retires. The general rule is that in order to review a charge in this court upon the ground that it is not law, there must be an exception to it. 16 Fla., 379, 565; 14 Fla., 518; 15 How., 160.

The reasons for the rule are that unless such exception is taken the error is waived, and because one party will

not be permitted to thus surprise his adversary. The same rule should apply to this case, as the like reasons for its operation exist. Our attention, in this connection, has been called to the opinion of this court in the case of Baker against The State, 17 Fla., 410. That case, it will be found upon examination, went off upon other grounds. It is there said that omissions of the judge to sign and seal the instructions, or a failure to declare to the jury, in writing, his ruling, as required by the act, were fatal errors. We think this correct, but we did not mean, in the face of all antecedent decisions of this court and of the rule prevailing in the Supreme Court of the United States, to say that no exception was necessary to bring the matter to our attention under the provisions of the act of 1877. Our purpose was simply to call attention to the requirements of the act, in order that the court in the new trial awarded in that case would comply with them.

There are other errors assigned in this case, but the brief of counsel for appellant is restricted to a discussion of the error which we have disposed of. This is an abandonment of the other errors assigned, and while it is within the power of the court to look beyond the brief of counsel and to examine other errors, still such is not the practice of appellate courts thus to do, unless the record discloses a case of want of jurisdiction, or the case is attended with peculiar circumstances calling for such action. Our rule (No. 15) requires that the brief shall contain the points of law and fact to be relied upon in argument with a reference to the authorities intended to be cited. The rule we have stated prevails in appellate tribunals, having like rules to this court. 31 Ala., 612; 10 Ala., 109; 6 Ind., 5; 7 Cranch, 97; 15 Wall., 1; 17 Wall., 19.

Upon examination, while we do not think this a case constituting an exception to the rule, still as our conclusion

is the same at all events, we will examine the other errors assigned.

The second and sixth errors assigned are based upon exceptions to the judge permitting leading questions to be asked.

This is the exercise of a discretion not reviewable here, 16 Fla., 373; 3 Allen, 465; 2 Gray, 282; 7 Ala., 371; 43 N. H., 65; 30 Mo., 380; 13 Ala., 490; 37 Maine, 346; 36 Maine, 137; 9 Conn., 275; 20 Ill., 35; 20 N. Y., 170; 1 Greenleaf Evidence, §435.

The court in this case gave two of the instructions asked by defendant, refusing to give nine others requested. As covering the whole case as presented under the tstimony, the judge gave the five instructions asked for by the plaintiff. Simply rejecting the instructions asked for by the defendant under these circumstances, even though some of them stated the law correctly, would not be ground to reverse the judgment, where, upon a fair and full view of the case, the verdict of the jury was conformable to the law and the evidence, and where, as in this case, the law was fully and correctly stated to the jury. (12 Fla., 575.) Says the Supreme Court of the United States, 3 Otto, 291: "It is the settled law in this court, that if the charge given by the court below covers the entire case and submits it properly to the jury, such court may refuse to give further instructions." (7 Wall., 565.) Where a set of instructions is offered to a judge, by both plaintiff and defendant, the judge may say to the jury, after reading such set of instructions, I refuse to give those offered by the plaintiff or defendant, (as the case may be,) or I give those offered by the plaintiff or defendant, (as the case may be,) and if those given cover the law of the case so far as stated in both sets of instructions, the failure to give the others, although they too may declare the law, is not error. Where we see plainly that the testimony and the law, as applied thereto, justifies

the verdict, and that no injury could have properly resulted to the party by the action of the court excepted to, we will not reverse the judgment in order that there may be had a more formal trial to result, if the jury follows the law and the evidence, in the same verdict. This court has indeed gone further than this, having held that even where there are erroneous instructions the judgment will not be reversed, if the verdict is sustained by the law and the evidence. 6 Fla., 515; 5 Fla., 276; 8 Fla., 398; 2 Durn. and E., 4.

We will examine this case upon the evidence and instructions. What is the case?

A person, not Doctor Samuel VanMeter, sends from Jacksonville, Florida, a telegram in the Doctor's name to the national bank of Charleston, Illinois, about the first of March, A. D. 1879, requesting the bank to send $500 by express, care of the Arlington Hotel, Gainesville, Florida. The telegram was exhibited to John VanMeter, a son of the Doctor, and his agent at Charleston, who executed a note for $500 (which was subsequently paid by Doctor VanMeter) and directed the bank to send the money. The money was placed in an express envelope, sealed with the seal of the bank and addressed to Dr. S. or Dr. Samuel VanMeter, Gainesville, Florida, at the Arlington Hotel or house, and the package delivered to the American Express Company at Charleston, Illinois, for transmission to Gainsville, Florida, the point of destination. As one and last of the express companies on the line, the Southern Express Company received the package for transportation and delivery. This company received the package and delivered it to a party other than Dr. Samuel VanMeter, who (Dr. V.) subsequently, after its delivery to the wrong person demanded the package of the agent of the express company, who could not and did not deliver it. There is some conflict in the evidence as to the facts attending the delivery. The company's agent Cox testifies substantially that on

the 7th of March, A. D. 1879, he received by express a package marked Dr. Samuel VanMeter, at or care of the Arlington, a hotel in Gainesville, Florida; that on the next day he asked of the proprietor of this hotel if there was not such a man as the Doctor there; that the proprietor said there was not, but he had letters and a telegram from him, and was expecting him every day; that he exhibited the package of money to the proprietor; that upon going to the evening train, George S. Huff, proprietor of the Varnum Hotel, in Gainesville, asked him if he had a package for Dr. Samuel VanMeter; that the witness answered yes; that Mr. H. said he (Dr. V.) is here now, and is going to stop at the Varnum Hotel; that witness said I thought he was going to stop at the Arlington; that Mr. H. said no; that Mr. H., after getting VanMeter's baggage off, then came to me and asked me if I would not come and bring the package to the Varnum Hotel; that witness said no, he would not have time, but if he would bring Dr. VanMeter to his office he would deliver it; that after being at his office ten minutes Huff and VanMeter walked in; that the witness was at the further end of the store waiting on customers and Huff halloed to him and said he would take that package now; that witness said I suppose you want VanMeter's package, and both said yes; that Dr. VanMeter signed the receipt for the package, paid $4.75 charges on it, counted the money and said it was all right; that while he was counting the money Huff took the envelope and tore it to pieces; that he afterwards received a telegram directing him not to deliver; that witness knew George S. Huff for a year before this occurred; that he stands well in the community, and that he would take his word in anything; that witness' instructions from the express company were that if the parties were not known to me, not to deliver packages until the parties were identified by a person I knew. The witness then states that about a

month afterwards another person applied for the package. Upon cross-examination, this witness states that he did not know that the man to whom he delivered the package had received mail matter from the Arlington Hotel, and that he would not have delivered it if it had been marked to the care of the Arlington; that when packages were "to care" he delivered only to care, when "at" to the person calling for them; when directed "at" it goes to any one applying for it.

Mr. George S. Huff, the proprietor of the Varnum Hotel, as to delivery and identification, swore substantially that he met a party representing himself to be Dr. Samuel VanMeter on the train at Gainesville, on the 8th day of March, 1879, and that the man stopped at the Varnum Hotel, of which he, witness, was proprietor, from the 8th to the 10th of March; that this party at the train asked witness to enquire of the express agent whether there was a money package for him in the office, or whether it had been taken over to the Arlington House; that he gave witness his name on a card, and witness asked the agent, Mr. Cox, concerning the package. He said the package was at the express office. I asked him to bring it to the hotel that evening. He said he would not have time to do so. I said then the gentleman would have to come over after it. This conversation occurred at the railroad depot. The party representing himself as Dr. V. then went with witness to the Varnum Hotel, and wrote an order to the Arlington House for his letters, which he said had been sent there for him. After this we went to the express office, where we found the agent, Mr. Cox, selling some groceries. I said, across the room, that this gentleman was after that money package; that he thinks these were the exact words he used; that when the agent got through waiting on the customer, he came across to the safe, near the desk, took from the safe a package, I think laid it on the desk; then

the man signed the book; that the man counted the money in my presence, said there was five hundred dollars, and remarked, I think, that it is all right. This witness testifies further: that he knew nothing of the man except what he saw and heard from him while in his company; that he was not sufficiently acquainted with him to vouch for his identity to the express agent; that the agent at no time before the delivery of the package asked whether he knew the man to be the person he represented himself to be, nor did he ask me at any time before delivering the package whether I knew this person to be Dr. S. VanMeter. The witness states further that the agent did not, in his presence, demand of the party any identification; that he was near enough to have heard it if made, unless the demand was in a low tone of voice; nor did he see the man produce any document to identify himself; nor was there, so far as he saw, any person from the Arlington House present; that he became acquainted with the man while drumming on the train for his hotel, and spoke to him with a view to that business; he spoke of his mail matter, and of a money package which had been directed in the care of the Arlington House; he wished to know whether it had arrived; I told him I would ascertain from the express agent at the depot if he would give me his name; he wrote his name on the back of my card, "S. VanMeter;" a similar name was on his letters and papers, and he so registered at the hotel. The witness states that he does not remember introducing him to any one before going to the express office, and that it was about three-fourths of an hour after he met Mr. Cox at the depot that he went with the stranger to the express office. When we arrived there, as well as I can remember, I said: "this gentleman (meaning Mr. VanMeter) is here for the money." I went with him simply to extend the courtesy of the hotel; I did not tell Mr. Cox that the party had mail matter at the Arlington. Some of the tes-

timony of this witness, which was objected to, we have omitted, it being matter of opinion or matter otherwise improper.

Thus stating the case, and reciting the evidence, so far as there is any conflict, the only question is, does the evidence disclose a performance of its duty by the Southern Express Company? It appears that it transported the package to its place of destination, but that it delivered it to a person not its owner, and not the person to whom it was addressed. The only question in the case was whether there was that care exercised in the matter of identification and delivery here which the law requires. Even accepting the testimony of the agent of the express company, there was not such care exercised here as the law requires. It is shown that the agent expected the party to whom the package was addressed to arrive from another place; that he was not a resident of the town at which the package was to be delivered; that the agent did not know him. This agent meets the party assuming to be the person to whom the package is addressed at the train at the depot. While there the proprietor of a hotel, other than that at or to the care of which the package was directed, asks him if he had a package for Doctor Samuel VanMeter, and, upon his replying in the affirmative, the hotel-keeper says he is here now. Upon being asked to bring the package to the hotel, the agent declines to do so; not for want of identification, but because he would not have time. The agent tells the hotel-keeper that if he would bring Dr. V. to his office he would deliver the package. When the party comes to the office to get the package, the agent delivers it without any further identification than that the person who accompanies him, a hotel-keeper, known to the agent as a reliable person, with whom the stranger is stopping, treats the stranger as Dr. VanMeter, the hotel-keeper not stating that he knew the stranger to be the person he represented him-

self to be, and without any identification at all. Had the agent asked the hotel-keeper whether he knew this party to be the person he represented himself to be, and how he knew him, the agent would have been at once informed of the extent of the hotel-keeper's knowledge, and that was that he only knew that the man so represented himself. The express company was a bailee of the property, under an obligation to deliver to the rightful owner, and its delivery to a stranger, not the rightful owner, cannot be justified upon the ground that a keeper of a hotel at the point of destination, known to the agent, and in whom he has confidence, simply treated the party as the person entitled to delivery, the agent at the same time knowing the party to whom he delivered the package was a stranger who had just arrived in the town.

This being the first case of this character in this State, we do not deem an examination of the instructions given in this case either improper or inappropriate. They were each excepted to.

The first instruction was in effect, that the Southern Express Company, though it may not have been the first carrier to which the money was delivered, yet if it received the money it was bound to deliver it in accordance with the address on the package containing it, and if it delivered it elsewhere than as addressed, or to another person, the company is liable for any consequent loss or damage.

That thus to deliver the package is generally the duty of an express company receiving it for transportation to the point of destination, its line extending to the point of destination, we think cannot be reasonably denied. It is a common carrier responsible for subsidiary means of transportation. (97 Mass., 124; 3 Otto, 174.) And the rule now prevailing in most of the States (an able commentator on the law of carriers says in all except the State of Georgia, 38 Ga., 37, 519; Hutchinson's Law of Carriers,

§150,) is that the owner may proceed against the carrier in fault in causing the loss or damage. (32 Ill., 116; 49 N. H., 9; 53 Ala., 19.) This rule differs from the English rule, and it may perhaps be difficult to explain it in view of the fact that there is no privity of contract between the owner and the last carrier receiving the package, but as it "commends itself upon grounds of both justice and convenience," and is the general law of carriers in the United States, we think it should prevail here.

The next instruction was in substance that the express company, without reference to the party who may have ordered the money sent, or who may have telegraphed for it, was bound to deliver it to the plaintiff if it was sent to him and he was the owner. This instruction, viewed in reference to the testimony, is nothing more than that a forged telegram is no excuse for the delivery to a party not the owner, and to whom it was the contract of the carrier to deliver it.

Notwithstanding the forged telegram, this carrier, in making a personal delivery, was bound by law to deliver to the person to whom the package was addressed, he being its true owner. (25 Ind., 492; 29 Ind., 27.) An express company belongs to that class of carriers who undertake to make a personal delivery of the goods to the consignee, and it is held to great strictness in the performance of this duty. It is the settled doctrine of England and of this country that there must be an actual delivery to the proper person at his residence or place of business, to his number, or to the party in whose care addressed, and in no other way can the carrier discharge his responsibility, except by proving that he has performed such engagement, or has been excused from the performance of it, or been prevented by the act of God, or a public enemy. (5 Bar. & Ald., 52; 3 Brod. & Bing., 177; 2 Kent Com., 604; 23 Ill., 201; 7 Wis., 1; 99 Mass., 259; 113 *Ib.*, 280; 45 N. Y.,

13; 50 Ala., 350; 72 Penn. State, 274.) A modification of the rule as to personal delivery is sometimes sustained upon the ground of custom or usage, but nothing of that kind enters into this case.

The third instruction is to the effect that the company here was bound to deliver unless prevented by the act of God or the public enemy; that no act that is done by human agency will excuse it from so doing; that the carrier is bound under the law to deliver to the proper person, and that a delivery by mistake to the wrong person does not excuse. This is the general rule. The fourth instruction is in principle embraced in the others, and we see no necessity for its extended examination.

The fifth and last instruction is substantially that the address upon a package delivered to a common carrier, is of the very essence of the contract between the carrier and the sender of the package and of the person to whom it is sent, and if the carrier delivers the package to any other point, or to any other person than at the exact point, or to the identical person to whom the package is addressed, the carrier is liable for any loss sustained.

Goods thus forwarded by express must be delivered in accordance with the directions upon the package containing them, and in this view this direction may be regarded as a part of the contract. This is the general rule applicable to this case. 55 Barb., 443; 45 N. Y., 13; 49 *Ib.*, 442; 5 Duer, 55.

Judgment affirmed.

JOHNS' EXECUTORS, APPELLANTS, VS. ADDIE A. JOHNS, APPELLEE.

The statute regulating a change of venue upon affidavit setting up a fear that a party will not receive a fair trial on account of the judge "being prejudiced" limits the power of the court to one removal; a second change of venue being unauthorized, consent or waiver of errors cannot give it validity.

Appeal from the Circuit Court for Putnam county.

The facts of the case are stated in the opinion of the court.

S. Y. Finley for Appellants.

Fleming & Daniel for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The ground urged for the reversal of the judgment herein rendered is alleged error in the Circuit Court, in not arresting the judgment upon appellants' motion.

The respondent Addie A. Johns filed her petition in the County Court of Bradford county, praying an assignment and allotment of dower in the real estate of her deceased husband, that her interest in the personal property might be set off, and that the executors of her husband's will might be required to give bond. The prayer of the petitioner was denied. She took an appeal to the Circuit Court for Bradford county. In that court, upon an allegation under oath, that she feared she would not receive a fair trial because the executors had an undue influence over the minds of the inhabitants of the county, it was ordered "that the venue be changed to Duval county, and the case be transferred, and the papers sent to the clerk of said

court." After the cause was transferred in compliance with this order, J. M. Johns, one of the executors, made an affidavit under the same statute, (act of November 23rd, 1828, Duval's Compilation, 96; Thomp. Dig., page 333,) to the effect that he feared that he would not receive a fair trial "on account of the judge of the court, where the suit is depending, being prejudiced," and the venue was changed to Putnam county, in the Fifth, another and different Judicial Circuit.

We have here a second transfer of this case, a second change of venue. The statute controlling the subject provides that there shall not be more than one removal of the same cause. (Thomp. Dig., 333.) Under this statute we do not think there can be a waiver of errors, so as to give jurisdiction.

The Circuit Court of Putnam county can have no jurisdiction except under the statute, and, as it positively prohibits more than one removal, we cannot see how this proceeding can be sustained. The cases called to our attention are cases where a transfer can be made under the statute. In such cases, if the order making the transfer is found in the record, and the parties appear, mere irregularities are waived.

This is not a proceeding under the act of January 24, 1851, entitled an act to provide for the more effectual administration of justice in the courts of this State. That act relates to causes disqualifying a judicial officer. The act under which this proceeding is had is special, and the clause prohibiting more than one removal must control in the cases covered and provided for by it.

The judgment is reversed, and the cause, and all papers connected therewith, will be remanded to the Circuit Court of Duval county, there to be disposed of in accordance with law.

HANCOCK AND MILLS, APPELLANTS, VS. HORACE H. HALE, APPELLEE.

As between a *bona fide* holder for value of a negotiable promissory note transferred before due and the maker, a plea of want of consideration, or fraudulent consideration, constitutes no defense to an action on the note, unless notice of the facts constituting such defense, at or before the transfer, is brought home to the holder, and a plea which does not allege notice is bad.

Appeal from the Circuit Court for Hernando county.

There is nothing in the pleadings to indicate that the note was transferred after its maturity. The pleas allege that Mills signed as a surety.

The other facts of the case are stated in the opinion of the court.

James T. Magbee for Appellants.

S. M. and G. B. Sparkman for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

Appeal from the judgment of the Circuit Court, Hernando county, in an action of assumpsit.

Hale, appellee, sued appellants upon a promissory note, signed by them, payable to N. R. Carter & Co. or bearer, dated November 1, 1875, due in one year, for $300, and then and there transferred to the plaintiffs for value, as alleged in the declaration, of which defendants then and there had notice.

Defendants pleaded that the note was without valid consideration, and obtained by fraud, and by means of certain threats to seize defendants' goods for an alleged indebtedness by one Turner, who took the note payable to Carter & Co., who had no interest in the matter.

Plaintiff demurred to the pleas that they set up no valid defense to the action, and as to the plaintiff it does not appear by the pleas that plaintiff had notice of any legal or equitable defense, or of the facts therein alleged.

The demurrer having been submitted, the court sustained it, and gave leave to defendants to plead over, but no further plea being interposed, judgment was had for plaintiff, from which defendants appealed.

The failure to allege in the plea that plaintiff had notice of the alleged facts set out in the plea is fatal.

The plaintiff having taken the note from payee for a valid consideration, as alleged and not denied, and without notice of any defense according to the pleadings, is a *bona fide* holder, and not affected by the alleged defect in the consideration. Story on Promissory Notes, §§191-197, and citations; 7 Term R., 630; 2 Esp. R., 538.

The judgment is affirmed with costs.

NOEL R. RAULERSON, APPELLANT, VS. ROCKNER'S ADMINISTRATRIX, APPELLEE.

1. Parties consenting that two actions of the same character between the same patries with like defenses shall be submitted to the same jury for trial at the same time, having made no objection to the rendition of one verdict at the time, will not be heard to object thereafter.

2. A defendant is asked if he knew of his own knowledge certain matters in issue in the suit of otherwise than by personal communication or conversation with the deceased person whose administratrix is the plaintiff; *Held,* That the question was not an improper one under Chapter 1983, Laws.

Appeal from the Circuit Court for Orange county.

The facts of the case are stated in the opinion of the court.

St. Clair Abrams & Summerlin for Appellant.

E. K. Foster for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The judgment herein rendered is one judgment in two actions of the same kind with similar defenses between the same parties, the parties having consented to submit the two cases to the jury for trial at the same time. This judgment thus entered is one of the errors assigned, it being claimed that there should have been separate verdicts and judgments in each case. It is too late, after the agreement stated, no objection being taken at the time of verdict rendered, to urge objection to such irregularity upon a motion for new trial.

There are a number of other errors assigned, most of which we think are not well taken, but it is unnecessary, as there must be a new trial, to go into an elaborate discussion of them. This suit was originally instituted by Julius C. Rockner, and after his death revived by his administratrix, the respondent.

During the progress of the trial, defendant being made a witness, was asked "if he knew of his own knowledge otherwise than by personal communication or conversation with Julius C. Rockner that he, Julius C. Rockner, had notice of the fraud and failure of consideration before he obtained, or claimed to have obtained, possession of the notes?" To this question there was objection, and the question was excluded on the ground that it was not admissible under Chapter 1983, Laws, being an act in relation to testimony in civil actions, approved February 14,

1874. We think this error. The subject of inquiry was not necessarily a "transaction" or "communication" between this witness and the deceased intestate. This witness may have had in his possession a written acknowledgment, signed by Rockner in the presence of witnesses, admitting such knowledge, or he may have had other evidence of such knowledge not constituting a transaction or communication between himself and the deceased party within the meaning of the statute. The effect of the ruling was to exclude such evidence, if it existed, and we think there must be a new trial. As a matter of course, if the witness, by his answer, attempts to speak to such prohibited matter, he will be stopped at once and the jury instructed not to regard it.

The judgment is reversed, and the cases will be remanded for a new trial to be had in each.

WILLIAM SEDGWICK, PLAINTIFF AND APPELLANT, VS. DEWITT C. DAWKINS, DEFENDANT AND RESPONDENT.

This memorandum indorsed upon motion papers, upon a motion in arrest of judgment: "Motion granted," and signed by the judge, is not a final judgment from which an appeal can be taken, but is at most an order that an entry be made in the record of judgment, in due form, to the effect that judgment upon the verdict, etc., be stayed, that plaintiff take nothing by his declaration, etc., and for costs, if costs are adjudged. (Proper forms in such case given.)

Appeal from the Circuit Court for Duval county.

This is an action under the Code. The other facts are stated in the opinion of the court.

John A. Henderson for the Motion.

THE CHIEF JUSTICE delivered the opinion of the court.

This is a second appeal in this case, and the record appears to be identical with that which was before the court at the last term, when the appeal was dismissed because there was no final judgment. The last order of the court was in these words: "Motion granted. Plaintiff excepts and gives notice in open court of intention to appeal," signed by the Judge January 21, 1879. This was indorsed upon the paper called a motion in arrest of judgment. There is yet no final judgment under this order. The appellant considers this order a final judgment from which an appeal can be taken. This court at the last term held that it was not and dismissed the appeal for that reason. Like the usual indorsement upon a demurrer by the judge: "Demurrer sustained" or "demurrer overruled," it is only an order upon which judgment may be entered sustaining or overruling a demurrer.

The following from Sellon's Practice, Vol. 1, 497, will give an idea of the proper practice in such cases: "Defendant had moved in arrest of judgment, and obtained the common rule, which is, that the entry of judgment be stayed until the court be moved on behalf of the plaintiff, and shall otherwise order, of which motion defendant had notice. Counsel for plaintiff admitted the objection in point of law, and prayed that an entry be made upon the roll as the adjudication of the court that judgment be arrested, which was ordered. For till this entry be made, the plaintiff can neither bring error, nor maintain a new action, as the rule leaves the action pending pleadable in bar to a new action."

The indorsement made by the judge in the case at bar was, in effect, thus: "The motion in arrest of judgment was granted; let judgment be entered accordingly." But there was no entry in the rolls after this, and so the matter

stands. The following, from Robinson's Forms, will give an indication of the proper entry to be made:

"This day, &c., and thereupon the matters of law arising upon the errors filed in arrest of judgment on the jury's verdict in this cause, and upon other errors assigned at the bar, being argued, it seems to the court that the said errors are sufficient in law to stay the judgment on the verdict aforesaid; therefore, it is considered that the plaintiff take nothing by his bill," or declaration, &c., (concluding, as in other judgments, for defendant.)

There being no final judgment authorizing an appeal, this appeal is dismissed at appellant's costs.

COLUMBUS J. PORTER, ET AL., APPELLANTS, VS. THOMAS J. TEATE, APPELLEE.

1. T. conveyed to P. certain land in Florida, and P. conveyed to T. land in Georgia, with full covenants, for the consideration of the Florida land. The title of the Georgia land failed by reason of prior incumbrances, and T. sued and recovered against P. on the covenants a judgment for the value of the consideration, P. having asserted his right to claim as exempt from sale a homestead upon the land: *Held*, That the covenant in P's deed is an "obligation contracted for the purchase of said premises" upon which the homestead is claimed, within the meaning of the Constitution, and the homestead right is subject to the payment of the money recovered for the breach of the covenant.

2. Where, in a bill filed to enforce an equitable lien upon land, a third person as defendant claims to be a purchaser in possession, and that he has made valuable improvements upon the land, and does not positively deny that he had notice as charged in the bill of the equities of the complainant, and does not show that he has entered into a valid agreement to purchase, nor paid any part of the purchase money, nor what improvements have been made by him on

the premises, or their value, such claimant has no standing as a *bona fide* purchaser without notice.

3. A married woman is not a necessary party to a suit to enforce an equitable lien arising out of an obligation contracted for the purchase of property claimed to be exempt as the homestead of the family, there being no right of homestead as against such lien.

Appeal from the Circuit Court for Jefferson county.

The facts of the case are stated in the opinion of the court.

Pasco & Palmer for Appellants.

T. L. Clarke for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

This was a bill in equity to subject certain lands to sale for money alleged to be due under an "obligation contracted for the purchase of said premises," the lands being claimed as exempt from sale as the homestead of the debtor, who denies that the money is due under such an obligation within the meaning of the Constitution and laws on that subject. Williams, who is a co-defendant in the bill with the debtor, claims that he is an innocent purchaser without notice of any legal or equitable lien. This appeal is from a decree that the land is subject to sale, and that it be sold to pay the alleged indebtedness.

The facts are that in 1875, Teate, complainant, owned four hundred acres of land in Jefferson county and conveyed the same to Porter, in consideration of which Porter conveyed to Teate certain lands in Georgia by warranty deed, with full covenant, as to title, against incumbrances, and for possession, &c. In 1876, Teate, having taken possession of the Georgia land, was ousted therefrom by a sale thereof by the United States Marshal of Georgia under an execution issued upon a judgment lien antedating the conveyance

by Porter. Teate then, in 1877, recovered a judgment in the Circuit Court for Jefferson county against Porter upon the covenants contained in his deed to Teate, for over four hundred dollars. Execution having been issued upon this judgment, the lands in Jefferson county were sold by the sheriff for $100, and Teate became the purchaser. Meantime, Porter claimed 160 acres of the 400 as his homestead. In an action of ejectment by Teate against Porter, the 160 acres were held to be exempt, and Teate failed to recover the same under his execution sale and sheriff's deed. This bill was then filed, claiming that the 160 acres was not in equity exempt from sale under the exemption clause of the Constitution, and praying a decree of sale to satisfy the balance of the money due.

The provision of the Constitution under which the claim of exemption is made contains this exception: "But no property shall be exempt from sale for taxes, or the payment of obligations contracted for the purchase of said premises." (Article IX., Section 1.)

The ultimate purpose of the homestead exemption is to protect the head of a family and the family from want and penury, and from being homeless by reason of misfortune. But it was never intended by these laws that a purchaser and his family should possess and enjoy property not paid for within the spirit of the contract of purchase, while the seller and his family were not compensated for it. There is no equity in allowing a purchaser and his family to obtain the homestead of another man and his family, and keep it, by any subterfuge or overreaching, by which the seller's family is turned out of doors, and get nothing for *their* home. A homestead obtained by fraud, or the semblance of fraud, is not contemplated by the law.

Here is a case where the seller of land parts with his property in consideration of other property conveyed to him, with a covenant that the latter is free of incumbrances, the

title is unassailable, and that he shall enjoy it, while at the very moment, according to the evidence, the property was encumbered beyond the warrantor's means of redemption, or his disposition to redeem.

I see no way to avoid the conclusion that the covenant contained in the deed of Porter to Teate was the only valuable consideration received by the latter for the land in Jefferson county. The effect of the covenant was that if the consideration for the sale of the Jefferson county lands, to-wit: the title to the Georgia land failed, the covenantor would pay its value in money, and this covenant to pay money was an "obligation contracted for the purchase of said premises." The breach of the covenants and the value of the consideration was legally established by the action and recovery of judgment by Teate aginst Porter. The judgment establishes the amount due Teate of the consideration for the sale of the Jefferson county land, which had not been paid or otherwise satisfied.

Whatever the effect of the transaction might have been upon the question affecting the equitable lien for "for purchase money," as recognized in equity jurisprudence, the provision of our Constitution expressly declares that the land is liable to make good an "obligation contracted for the purchase of said preimses," as against the premises claimed as a homestead by the purchaser.

I have found no case presenting facts precisely similar, but the principle to be applied here is fully recognized in Whitaker vs. Elliott, 73 N. C., 186. There Whitaker sold to Elliott a quantity of land, and the consideration was paid by Elliott in notes, which he held against one Wilkins, by indorsing them to plaintiff. The notes were received by Whitaker in payment for the land. Judgment was obtained by Whitaker against Elliott upon his liability as indorser on one of the notes.

Elliott claimed that the land was exempt from sale as

his homestead. The constitutional provision was precisely like that in Florida, as above quoted. The court says: "The word 'obligation,' as here used, means a debt contracted to be paid, or a duty to be performed by the purchaser as the consideration of the purchase of the premises. * * The case, then, falls directly within the restriction of the Constitution excluding him from a homestead which he has not paid for, and of which, therefore, he is not the owner as against the obligation contracted for its purchase. The principle is a salutary one and founded on the highest degree of mortality and good faith."

The obligation of the indorser was that of a surety, and his liability was contingent upon the failure of the surety to pay the notes which were transferred and received in payment for the land. In a similar case in Georgia, Lane vs. Collier, 46 Ga., 580, the same rule was maintained.

The liability of Porter upon his covenant to pay the money was also contingent upon a breach of its stipulations.

Whether this was a sale or a technical exchange of land, cannot affect the principle. "If, after an exchange of lands or other hereditaments, either party may be evicted of those which were taken by him in exchange through defect of the other's title, he shall return back to the possession of his own by virtue of the implied warranty contained in all exchanges." (2 Bl. Com., 323.) But it is agreed in the argument of this case that by the terms of the deed this was a *sale* of lands.

There was testimony in this suit going to show, as is claimed, that the 240 of the 400 acres sold under the execution against Porter, and the crops thereon at the time of sale, though bid in by Teate at $100, were in fact worth about the amount of the judgment, and it is claimed by Porter that it is inequitable that Teate shall keep the 240 acres and crops without giving Porter credit for what they are proved to be actually worth. If we should turn the point

of this argument toward Porter, it might be asked of him that he surrender to Teate *all* that he obtained from him without adequate compensation. After obtaining his property for nothing, with what grace can he appeal to the law to exempt it to him without paying the value or price of the same property? There is no proof, however, that the sale was not fair and public, or that it has been so adjudged. If the 240 acres were worth a much larger sum than they sold for, there seems no reason to suppose that Porter was prevented from bidding or procuring others to bid more. There appears no ground for the claim that Teate should pay more than he was willing to pay for the land and crops or that the sale was unfairly conducted.

It is further urged by counsel for Porter that his wife is a necessary party in this suit, because of the peculiar right of property in a homestead vested in the husband and wife by the Constitution. If there is such investiture of right or of title to the homestead in the wife, it cannot prevail as against an obligation for the purchase of the premises since, as to a debt of this character, there is *no right* of homestead. (See Thompson's Homesteads and Exemptions, Sec. 362, and authorities there cited.) Like a mortgage or other equitable lien for the purchase money, the wife's interest is subordinate to its payment. The wife of Porter was not a party to the deed or its covenants.

As to defendant Williams, it is alleged in the bill that he is in possession under Porter, but that Williams went in with full notice of the transaction of Porter's obligations, and of the judgment and of complainant's rights. Williams, in his answer, says he has no particular knowledge of the transactions, but "living in the same part of the county as the land is situated, at the time of the alleged exchange between the parties, and ever since he has heard these transactions talked about, and has a general knowledge in regard thereto," and that Teate

having failed in his ejectment suit to recover the 160 acres from Porter, and Porter being in peaceable possession of the homestead tract, and "finding it inconvenient to reside upon the said tract, bargained the same to this respondent, and promised to make a deed thereto to him," and gave him possession of the homestead tract, "who holds the same under the said bargain and purchase, and has made valuable improvements and is planting his crops upon said lands."

There is no denial of the charge that Williams went in with full notice of complainants' rights, of the judgment, and the obligations of Porter in the premises. There is no claim made by Williams that he has paid anything, or obligated himself to pay anything for the property, and no statement as to the character or value of the "improvements" he has made, and there is no intimation that he has entered into any valid contract for the purchase. Porter is under no obligation to him, nor is he under any obligation to Porter, according to the tenor of his answer. He is merely in possession, "holding the same under respondents' title," in the language of Porter's answer. He offered no proof in support of his claim. We cannot regard him as an innocent or *bona fide* purchaser, without notice of complainant's equities. It is further remarked that the proofs show that the consent of the County Judge to the sale by Porter of the "homestead" bears date subsequent to the commencement of this suit, and therefore Williams' must have been made with notice, under the rule of *lis pendens.*

We are of opinion that the decree of the chancellor is fully sustained by the facts and the law and equity of the case, and it must be affirmed.

SANDERSON'S ADMINISTRATORS, APPELLANTS, VS. MARION H. SANDERSON, APPELLEE.

MARION H. SANDERSON, APPELLANT, VS. SANDERSON'S ADMINISTRATORS, APPELLEES.

1. A court of equity has concurrent jurisdiction with the Probate court over the administration of the assets of deceased persons. That annual accounts have been filed in the Probate Court does not divest a court of equity of this jurisdiction. After bill filed by heirs against the administrators praying accounts and distribution, and the suit is pending in the court of equity, annual accounts passed and approved by the Probate Court are not *prima facie* evidence of payments purporting to have been made. The master should require the accounts to be proved if it is demanded.

2. A bill by a widow seeking account and distribution of her husband's estate, alleging that she is the widow and heir of her deceased husband, it being apparent on the face of the bill that there was issue of the marriage in being, is defective. She has, under the statute, a right to elect a child's part, but her claim is as widow making such election, and not as heir at law, and such must be her allegation.

3. Under the statute of this State, as well as under the general rules of chancery practice, a suit in chancery by an infant is brought in *her own name* through her next friend. A suit by one "as guardian" of the infant does not bind the infant, she being no party.

4. A bill by distributees against administrators for mismanagement against one, and a general accounting against both, embracing in the demand a debt alleged to be due the estate by one of the administrators, arising from partnership relations existing between him and the intestate, is not multifarious.

5. That a person purporting to represent an infant distributee as general guardian in a bill against an administrator for account and distribution, is not such guardian, is not a proper subject matter for a cross-bill; nor is a claim by an administrator against the estate as surviving partner of the deceased intestate a proper subject matter of a cross-bill when, in the original bill, the plaintiff prays a settlement of such account. The administrator in such case is an actor in the master's office.

6. After the expiration of six months from the taking out of letters of

administration the administrator may be compelled to make distribution upon the person entitled giving bond and security to refund a due proportion of any debts or demands which may afterwards appear against the estate, and all costs which may be awarded on the same; provided such debt or demand appears within two years after granting letters of administration. The practice in such cases is to make the execution of the refunding bond a condition precedent to the payment of the distributive share.

7. The general rule of accounting in such cases, as heretofore announced by this court, (5 Fla., 556.) is, that interest at the rate of eight per cent. will be charged, the interest upon the balance found at the beginning of a year to be carried into the balance struck at its close, computing interest for the next year upon the whole, no interest being computed upon the sums when received.

8. While it is within the power of this court to consider points made here for the first time, if raised by the pleadings and proofs, yet care must be taken that neither party be permitted to surprise or mislead his adversary, or to make objections which, if made in the Circuit Court, might have been obviated. Hence, where, in the petition of appeal and original brief of appellant, there is no objection to an account passed by the master upon the ground that the items thereof were not proved, and there is nothing in the record to show that such an objection was made in the Circuit Court, this court will not consider such objection urged in a supplemental brief.

9. An administrator upon a solvent estate, upon his qualification, should pay the debts and wind up the estate as soon as practicable. Investments in mortgage securities, not approved by the Probate Court, are unauthorized. When such investments are made, the heir may take such as he desires and reject those not acceptable to him. The administrator may be charged with such amounts of interest or principal as he has actually collected on the rejected securities in his annual returns, in which event he will be charged with only simple interest on the balance of principal for the time during which interest was not collected; or, at the option of the heir, the administrator may be charged with the principal sum invested in the rejected security, with annual rests as prescribed for his general accounting.

10. An exhibition or presentation of a claim to the administrator, within the limitation of one year from the issuing of his letters, (section 15, chapter 1869, laws,) stops the running of the statute

of non-claim, as well as the statute limiting the time for actions against an administrator. The creditor is not obliged to reduce his claim to judgment. What constitutes an exhibition within the meaning of the statute, considered and defined.

11. The general rule is that an administrator may or may not plead the general statute of limitations against a claim not barred in the lifetime of the intestate and otherwise justly due. This rule, however, is not applicable to statutes in terms limiting the time in which an action may be brought against him in his *representative capacity as administrator*. He should be charged with all the debts paid which were barred by such statutes. Section 15, of the act of November 17, 1872, chapter 1869, laws, is such a statute. The terms, "after the expiration of that time," in the section referred to, considered and explained. A majority of the court hold that where notice calling in claims under the statute of non-claim had been given anterior to the passage of the act prescribing the limitation of one year, the limitation of one year does not operate.

12. Upon an accounting in the master's office between the distributee and the surviving partner of the intestate, on account of the partnership transactions, the surviving partner, who is administrator, is chargeable with only simple interest upon sums found due by him; also in like manner if the balance is found against the estate, it is charged with simple interest only.

13. An administrator of a solvent estate has a right in this State to retain a debt due himself not barred in the lifetime of the intestate or at the date of the issuing of his letters. It is not necessary that he should file his claim with the Judge of Probate, or present it to himself, to save the operation of the statute of limitations or the statute of non-claim. Upon final settlement he has a right to have his claim satisfied, if it is not of such character as a presumption of payment will operate.

14. Where the fair presumption and conclusion from the evidence is that an administrator, who was the surviving partner of the intestate, did not at the commencement of the suit know of the reception of moneys on partnership account by the deceased, and the lapse of time has not been sufficient to make it a stale claim, no presumption of payment arises.

15. One member of a firm is entitled to participate in sums received for professional services by the other member of the firm, notwithstanding the party paying the money swears no such sum was due, he, the party paying, having since its payment waived all right to its recovery against the firm and the member receiving it.

16. One of two partners, as attorneys at law, has no right, in the absence of a special contract or custom, to share in sums realized by the other as commissions for sales of stock in a railroad company; nor can he share in sums realized for services other than those which belong to their professional relations. Where he alleges that a sum was realized by his co-partner for professional services, the burden of proof is upon him to establish it.

17. Under the statutes of this State, an administrator asserting his own claim against the estate in the master's office, stands in the relation of any other creditor, so far as testifying to transactions and communications had by him with the deceased in reference to his own debt is concerned. He is disqualified except as to matters to which the distributee is examined on his own behalf. As to the claim of any other creditor against the estate, he is a competent witness to transactions and communications with the deceased intestate.

18. Wherever either heir or distributee puts the administrator to proof of a voucher regular and proper on its face, the payment of which is sworn to by the administrator, such heir or distributee, in the event the claim is established, should be charged with all costs attending such proof.

Appeal from the Circuit Court for Duval county.

The facts of the case are stated in the opinion of the court.

Fleming & Daniel and *John E. Hartridge* for the Administrators.

H. Bisbee, Jr., and *Horatio Jenkins, Jr.*, for Marion H. Sanderson.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

Both parties appealed from the decree in this cause. It is a suit in chancery by Marion H. Sanderson, representing herself and Mary A. S. Sanderson, an infant, as distributees of the estate of John P. Sanderson, the deceased intestate, against the defendants, L'Engle and Hartridge, his admin-

istrators. She sues in her own right, and as guardian of her infant daughter, Mary A. S. Sanderson. The bill was filed in February, A. D. 1876, in the Circuit Court of the State of Florida, for the Fourth Judicial Circuit, in Duval county. Plaintiff, in her bill, alleges substantially, that John P. Sanderson was the husband of Marion H. Sanderson, and the father of Mary A. S. Sanderson, and that he died intestate on the 29th June, A. D. 1871, leaving them his only heirs surviving; that defendants, on the 7th November, A. D. 1871, were appointed administrators, and that they qualified and entered upon their duties about that time; that the personal property and assets of the estate were appraised at a sum exceeding $50,000, a large portion consisting in money, and that nearly the whole amount went into the control and possession of the defendant, L'Engle; that defendants have not made and effected in the "probate office" of the county any annual settlements of their accounts; but that the defendant, L'Engle, has made out, and left in the custody of the Judge of Probate, four papers purporting to be accounts current between the estate and the administrators, for the four years ending May 31, A. D. 1872, May 31, A. D. 1873, May 31, A. D. 1874, and May the 31st, A. D. 1875; and that said papers are not signed by Theodore Hartridge, nor have they been approved and allowed by the Judge of Probate; that said defendants have not faithfully discharged their trust.

That the said L'Engle has paid claims against the estate which were not legal or just demands when paid; that L'Engle, without leave of the Probate Judge, has loaned a large portion of the money of the estate, some of which has been secured by mortgage and some loaned without security; that the defendant L'Engle has, moreover, retained in his hands large sums of money belonging to the said estate for his personal use, which should have been invested and secured, and that he has collected large sums of money

and other assets, which do not appear in the appraisement; that Sanderson was an officer of the Florida Central Railroad Company, and the Jacksonville, Pensacola and Mobile Railroad Company, and said companies were, at the time of his death, largely indebted to him for personal services.

That Milton S. Littlefield, President of the J. P. & M. R. R. Co., was also indebted to him for stock in said railroad company, and that since said Sanderson's death, said L'Engle, on account of moneys due his interstate as aforesaid, received the large sum of $40,000, for which he has failed to account.

That Sanderson was a practicing attorney, and for two years prior to his death was associated with the defendant, L'Engle, in the practice of law; that at the time of his death there was due said Sanderson, by said railroad companies, and their officers, and by others for professional services rendered by him alone, and as a member of said firm of Sanderson & L'Engle, various large sums of money; that the defendant, L'Engle, has in his possession the books of his intestate, and of said law firm, and the complainants have no means of knowing what is due the estate, nor what has been received or collected on account of such professional services, except by a discovery from the defendants.

That the defendants have failed and neglected in other respects to discharge their trust as such administrators; that the debts of the estate were small, and that Sanderson left ready money enough to pay them all; that the estate might have been long since closed but that L'Engle, with the acquiescence of Hartridge, has imprudently delayed the settlement of the estate, and appropriated the moneys belonging to the estate to uses not authorized by law; that the defendants have paid sundry claims against said estate which are not legally chargeable thereto; that said estate, or the greater part thereof, will be lost; that certain personal property which should have been sold and converted

into money has been retained, some of which has lessened in value and some has been used by L'Engle himself, while other property has been sold which should have been retained in kind; that the complainant has been kept in ignorance of the condition of the estate, and without means of support for herself and child; that the estate should have been distributed, but has not been; that the defendants have given separate bonds, which are defective and insufficient; that the papers filed in the probate office, purporting to be annual returns, are not sworn to or verified in any way, nor signed by defendant, Hartridge; that the entire amount of debts paid by said L'Engle, as appears by said returns, up to the filing of the bill, is $14,392.99, some of the items of which are not properly charges against said estate; that if the moneys of the estate had been invested promptly the interest at 8 per cent. with annual rests would have paid the expenditures to date; that money has loaned in the city of Jacksonville at rates from 12 to 18 per cent. per annum, and that the defendant, L'Engle, should have invested the funds of the estate of Sanderson at these rates, and should be made to account at the highest rates of interest which could be obtained in the market; that the defendant, L'Engle, excuses himself for not turning over the funds of the estate to the complainant by saying that she is not a person of business habits or knowledge, which is not the fact; that the notes and mortgages to secure the loans made by L'Engle have been made payable to L'Engle and Hartridge, administrators of the estate of John P. Sanderson.

The bill prays an accurate and itemized account from each of the defendants, a reference to a master to take testimony and report, the appointment of a receiver to take charge of the estate, and for an injunction and for distribution of the assets to the widow and child; that the defendants, having been made to account fully, and pay over the

amount found to be due by them severally as such administrators, be discharged from the further administration of said estate, and for general relief. The bill is signed by counsel but not sworn to.

To this bill the defendants, Edward M. L'Engle and Theodore Hartridge, answered severally.

L'Engle's answer was filed on the 5th day of June, 1876. It admits the relation of administrator and the alleged relation of the parties to the deceased intestate, denying, however, that Marion H. Sanderson is the general guardian of Mary A. S. Sanderson. He denies all charge of fraud, improvidence or failure to comply with the obligations of his trust and the requirements of law in the administration of said estate, or that he has used, or appropriated to his own purposes, any of the moneys or other assets of said estate.

He avers that he has received or collected no money or other property not included in the appraisement or in his returns as administrator; that he has received nothing on account of professional services due said John P. Sanderson, but has made some collections for Sanderson & L'Engle—not enough, however, to make up the deficiency due him as a member of said firm; that the examination of the accounts of said firm will involve much time and labor, and that he, the defendant, L'Engle, has been severely sick, and is still too sick to undertake this labor, but will do so as soon as his health permits.

He admits that he alone is responsible for the personal assets, and avers that they have been discreetly, properly and legally administered; that he has accounted for all the funds or other assets which have come into his hands; that he has been, and is ready at any time, to give an account of his dealings with said estate; that the moneys in his hands have been and are discreetly and safely invested; that his bond is good and himself responsible, and the estate

has suffered and will suffer no diminution or loss at his hands; that there is no guardian of the infant complainant authorized by law to receive her distributive share of the assets of said estate; that he has distributed in part to Mrs. Sanderson, and has been at all times ready to furnish her with such moneys as she needed, and to give her all proper information in regard to the affairs of said estate under his control and management; that the estate has been and is in litigation, and has never been, and is not at the date of filing said answer, in a condition to be closed; that he earnestly desires to wind up the estate, distribute what is left after paying the debts bewteen the complainant and her daughter so soon as a guardian, duly appointed and authorized to receive the distributive share of the latter, is appointed, and to be discharged. He denies the charges of fraud, illegality or improvidence in the administration.

The answer of defendant, Hartridge, was filed June 19th, 1876. He answers that he has had nothing to do with the personal assets, and that he has had charge of the real estate.

He denies at length and in detail all charges of fraud and mal-administration, and affirms that plaintiff, Marion H. Sanderson, is not the general guardian of her daughter Minnie, but that she was appointed guardian with a power restricted to receiving and receipting for her daughter's interest in certain life insurance moneys due the estate of J. P. Sanderson.

It has not been deemed necessary to insert in this statement of the case the allegations of any of the pleadings at full length, and as written. These allegations are material only as they relate to or affect the questions raised and discussed by the parties to the appeals.

To the extent that any specific allegation becomes material in the discussion of the questions arising upon the appeal, it will be stated in the treatment of these questions as they arise.

There were exceptions to each of the answers, but they were withdrawn and replication was filed on the 7th February, A. D. 1877.

We will not discuss the questions involved in this case in the order in which they are stated in the petition of appeal. We will first examine the bill as to parties. We will then examine the question of jurisdiction. After this we will consider the other grounds of appeal.

As to parties. We find at the threshold of our investigation a radical defect in this respect, which should be noticed in the appellate court. (2 Munf., 148; 9 Grat., 275; 3 Munf., 29.) Mrs. Sanderson, even though it be admitted that she is the general guardian of her infant daughter, and the record discloses that she is not, cannot maintain this suit in her behalf as guardian. Under our statute, (Thompson's Dig., 326, sec. 5,) as well as under the general rules of chancery practice, "infants may sue by their next friend in all cases whatsoever." Under our statute the next friend is required to file a bond. Where a suit in chancery is brought by a general guardian, no service being had upon the infant, the infant is not bound by the proceeding. The Supreme Court of Virginia, in speaking of such a case, says: "Whilst there is nothing in the scope of the authority of the guardian which empowers him to sue in his own name in such a case, much inconvenience would flow from such proceeding." (6 Grat., 301.) In that case the bill was dismissed without prejudice to a new suit in the names of the infants by their next friend. Chancellor Walworth, in the case of Bradley vs. Amidon (10 Paige, 239,) speaking of the authority of the general guardian of the estate of an infant appointed by the surrogate, says: "Such guardian is not authorized to file a bill in his own name to obtain possession of the property of his infant ward, but he must file it in the name of the infants as their next friend." (See also 2 Phil. on Ev., 4 Am. Ed., 81; 9 Grat., 273.) A

decree in such suit would not protect these defendants from further litigation with the infant. This being a bill for a general account and settlement by the heirs and distributees, all the distributees are necessary parties, (9 Grat., 273; Story Eq. Plead., 89; 2 Munf., 148;) and the application of the strict rule here would require the bill to be dismissed without prejudice. Courts of equity, however, have in many like cases remanded the case with directions to permit the infant to be made a party in a proper manner, the next friend being required to give the bond under the statute.

When the infant is made a party, as she is not now, bound by the proceedings in the Circuit Court, or in this court, she may have a re-investigation of the matters of account and other matters, (8 Ala., 611,) if she so desires.

Again, the allegation in the bill does not, as we think, give Mrs. Sanderson any standing as heir. The allegation is that she is the widow of John P. Sanderson, who died intestate on or about the 29th of June, A. D. 1871, leaving her and the said Mary A. S. Sanderson his only heirs surviving.

The widow has no beneficial interest in her husband's estate other than her dower, as *widow,* and the statutory allowances.

If she makes election of a child's part instead of dower, within twelve months after the granting of letters of administration, which the law allows, then she can have a child's part. The claim she makes, however, is not *as heir,* but as *widow,* having a right to elect a child's part in the estate of her husband. To make such a case, she should allege that as widow she has made such election as the law authorizes, and that she claims accordingly.

In this respect the bill may be amended upon remanding the case.

We next examine the question of jurisdiction. It is raised in those grounds of appeal which claim that the case should

be remanded to the County Court. The bill alleges that there had been no final settlement in the County Court; that no annual settlements had been made; that claims illegal in their character had been paid by the administrator, L'Engle, and the proof discloses that at the time this bill was filed the annual accounts had not been passed by the Judge of Probate. One of the prayers of the bill is for distribution. We cannot see that the simple fact of the filing of the accounts in the Probate Court, no proceeding being there pending to which the heirs were parties, looking to a final settlement, divests the court of chancery of its well recognized jurisdiction to decree, at the suit of those entitled, a settlement and distribution.

The bill here charges "maladministration" of the estate and failure to make settlements.

The power of the Probate Court in such cases is defined by statute, (Chapter 1733 and 3008, Laws,) and it does not go to the extent of the power of a court of equity which may, at the suit of an heir or distributee, render a final decree against the administrator. The Probate Court may remove the administrator, but it cannot grant the same relief as a court of chancery. An examination of the cases upon the subject, we think, can leave no doubt of the jurisdiction. 5 Mason, 105; 14 Fla., 537; 7 Fla., 45; 5 Fla., 542; 52 Ala., 238; 4 Bibb, 266; 2 Rich. Eq., 147; 52 Ill., 336; 16 N. J. Eq., 236; 12 Cal., 433; Story Eq. Juris., §532, *et seq.* to §544.

This jurisdiction, however, must be exercised in such manner as to protect the rights of all interested. Our statutes, (Thomp. Dig., sec. 7, p. 207, sec. 5, p. 206,) provides that after all debts and legacies have been paid, the property remaining in the hands of the administrator shall be distributed according to the statute of descents. The statute provides further, that no distribution shall be required of any administrator until the expiration of six months from

the taking out of letters of administration, nor shall administrators be compelled to make distribution until bond and security be given by the person entitled to the same to refund a due proportion of any debts or demands which may thereafter appear against the estate, and all costs which may be awarded in the same; provided, that such debt or demand shall appear within two years after granting the letter testamentary or letters of administration. It is contemplated by this statute, and it is in conformity with the spirit of all our legislation, that an administrator shall, upon his qualification, give prompt and due attention to the interests which he represents. That interest is not alone such as the heir, or distributee, or the creditor, or the estate, as distinct from those thus interested, has; it is the interest of all.

In the case of solvent estates, he should pay the debts and wind up the estate as soon as circumstances and a due regard for all interests will permit. Investments upon long credits and an employment of the funds in general investments, are no part of his duty. Investments and loans are permitted in order that during the adjustment of the various interests which he represents and the winding up of the estate, he may be held to a just accountability for the use of surplus funds in his hands.

Under these statutes, after the expiration of six months, the law going upon the presumption that he has in the meantime ascertained and paid uncontested and established debts, permits a distributee, upon giving security, to refund his proportion of debts, which "may *afterward appear* against the estate and all costs which may be awarded in the same," to compel distribution.

The letters of administration in this case were granted in November, A. D. 1871. This bill was filed in February, A. D. 1876, over four years after the granting of letters of administration, over three years after the limitation to ac-

tion against the administrator under the act of 1872 had become operative, and after the statute of non-claim had become operative. It is thus apaprent that the right to distribution under the statute had enured, the distributees giving the bond required in the event that there were outstanding claims against the estate which had been presented and denied, or which were being sued. (4 J. J. Mar., 152; 4 Bibb, 266; 1 Littell, 293.) The statute of Kentucky, under which these decisions were made, is substantially (except that the time was nine instead of six months) our statute. See 1 Ken. Dig., by Littell & Swigart, 1822, page 532; see also 1 S. & M., 546; 40 Miss., 748.

The practice in such cases is to make the execution of the refunding bond required by the statute a condition precedent to the payment of the ascertained distributive share. 1 Litt., 293; 1 S. & M., 546.

Thus disposing of these questions we consider other grounds for a reversal set up in the petition of appeal.

On the 19th of March, 1877, Joseph H. Durkee was appointed master, to take testimony and report facts. On the 9th of June, A. D. 1877, the defendant L'Engle applied for leave to file a demurrer to the bill, presenting the demurrer proposed to be filed. The court denied leave and this action is the first ground of appeal stated in the petition. The ground set forth in the demurrer is that the bill is multifarious in this, that it is exhibited against this defendant L'Engle, and the other person therein named as defendants thereto for distinct matters and causes, wherein one of these defendants, the said Hartridge, is in no wise interested or concerned; that the defendant, E. M. L'Engle, is sued as an administrator of the estate of J. P. Sanderson, deceased, and also as surviving partner of the late law firm of Sanderson & L'Engle, and relief sought against him in both capacities in the same bill; that the complainant,

in her individual cacapity, cannot call a surviving partner to account as to the business of the partnership.

The application to file a demurrer is made one year after the defendant had filed his answer, and after replication, and order of reference to take testimony, as to matters in issue under the pleadings.

The defendant at this stage of the proceedings and under these circumstances certainly had no right to interpose a demurrer under any known rule of practice. Independent of this, however, the bill is not multifarious. A bill by distributees against administrators for mismanagement and a general accounting, embracing in the demand a debt alleged to be due the estate by one of the administrators, arising from partnership relations existing between him and the intestate, is not multifarious. Such a debt is an asset to be accounted for, (2 Williams on Executors, 1310, note 1, 6th edition,) and such partner is a proper party in order to take an account of the personal estate, entire. (1 Russ. & Mylne, 277; 1 Ves. Jr., 106; 11 N. J. Eq., 389.) It is unnecessary to discuss the question. The case of a surviving partner is a special case. The authorities are directly in point and must control.

Subsequently to this action of the court an application of defendant L'Engle to file a cross-bill and supplemental answer was denied. This action of the court is the second ground of appeal. The cross-bill proposed to be filed accompanied this application. The relief sought by this bill is for the appointment of a guardian of the estate of the infant, Mary A. S. Sanderson, based upon an allegation that there has not been during the administration, nor is there now, any person having lawful authority to represent the estate of the infant. This is subject matter of defence to the original suit, and not the proper subject for a cross-bill. 14 Ga., 167; 20 Ga., 472; 3 Sand. Chy., 273; 34 Ala., 15.

Other relief sought by the cross-bill was a decree against

the estate for such an amount as might be found due the administrator from it, upon the accounting and a decree against plaintiff, M. H. Sanderson, for such sum as might be found to have been paid to her in excess of her distributive share. To the extent that affirmative relief could be granted the defendant, L'Engle, under a cross-bill in this cause in the matter of the account, he can obtain it by virtue of his rights as an actor in the master's office upon an accounting there to be had, and if as administrator, he has a right to retain, this right can be made effective without a cross-bill. Plaintiff and defendant are actors in a bill for an account, and in such cases there is no necessity for a cross-bill. (Story Equity, §522; 5 Leigh, 561.) So far as the matter of the supplemental answer is concerned, the amendment allowed to be made to the original answer embraced the allegations proposed to be made by the supplemental answer, and the facts alleged were as available under the amended answer as they would have been under the supplemental answer if it had been allowed.

The third ground of appeal is that the court erred in not dismissing the bill on the ground that the allegations of the bill were denied by the answers, and not sustained by the proofs. The consideration of this ground involves the discussion of the testimony and the merits of the decree appealed from. This decree is objected to and sought to be reversed on ten grounds:

The first is that there was error "in assuming as a basis for the decree the supplemental answer of E. M. L'Engle, leave to file which had been denied." (We understand from the briefs that this ground of appeal, being purely technical in its nature, is abandoned.)

The second objection to the decree is that there was error in disallowing the following charges of the defendant, E. M. Engle, viz: the items of $4,600, $5,000, and $5,000,

making $14,600, the item of $35,000 and the item of $998,-33, being interest on the $35,000.

We examine the items composing the charge of $14,600. These sums are charged by L'Engle in the account of Sanderson, with the firm of Sanderson & L'Engle, to Sanderson, as moneys received by him, Sanderson, for professional services as an attorney and counsellor at law, which he did not account for to the firm. An equal partnership in the practice of law is proved to have existed between John P. Sanderson and Edward M. L'Engle from the first of January, A. D. 1869. This partnership was dissolved by the death of Sanderson, on the 29th of June, A. D. 1871. The first question which arises here is, was the sum paid for professional services as attorney at law by either member of the firm during the existence of the partnership? If this be the fact, then unless there is some legal objection to the charge, as against the estate, it must stand.

Littlefield swears that the firm of Sanderson & L'Engle were his attorneys, as well as the attorneys in Jacksonville of the Jacksonville, Pensacola and Mobile and the Florida Central Railroad Companies; that Sanderson was appointed in 1869 attorney in fact of the J. P. & M. R. R. Co. Littlefield, who was its President, being absent in New York in August, 1869, Sanderson was clothed with full authority to represent his (L's) interests, and that of the Railroad Companies mentioned. A copy of this power of attorney is in evidence, which is marked exhibit E, and is as follows:

Know all men by these presents, that the Jacksonville, Pensacola and Mobile Railroad Company, by M. S. Littlefield, President, have made, constituted and appointed, and by these presents do make, constitute and appoint John P. Sanderson, of Jacksonville, Florida, its true and lawful attorney, for said company, and in its name, place and stead, to take charge of, superintend and carry on the construction of its line of road, to be built westward from Quincy, and

to make contracts for all kinds of labor, service and material, and right of way, and other things necessary and proper to be used in the construction of the said line of road, and generally to represent said company and M. S. Littlefield, as President thereof, and do and perform every act and thing in the premises as fully as said President could if personally present, necessary to have with full power of substitution and revocation hereby, and confirming all that said attorney shall lawfully do or cause to be done by virtue hereof.

In witness whereof I have hereunto affixed the seal of said company and annexed my official signature this the thirty-first day of August, A. D. 1869.

[SEAL.] M. S. LITTLEFIELD,
President J. P. & M. R. R. Co.

Signed and delivered in presence of E. M. L'ENGLE.

This money (the $14,600) was received by Sanderson from M. S. Littlefield originally not as a fee for professional services. It was a part of three items, of $5,000 each, paid by Littlefield to Sanderson, in the fall of 1869. As to these sums Littlefield testifies substantially as follows, upon his first examination upon the part of complainant: at the time of the payment of said amounts to Sanderson they were not paid for legal services, but were paid to him as my attorney in fact, for the payment of the engineer corps then engaged in constructing the J. P. & M. R. R. west from Quincy. I was the President of the J. P. & M. R. R. Company. In the spring of 1871 I learned from Sanderson that he had not so expended the money—that he had only paid out to the engineer corps about $400. It was then agreed that the money should be applied to professional services rendered, and to be rendered, by the firm of Sanderson & L'Engle. The agreement to thus apply the money was a verbal agreement, and was made between Sanderson and myself the latter part of April or May, 1871.

This witness states also that there was a written agreement between Sanderson and himself, in reference to the railroad companies, dated the 17th of May A. D. 1870. A copy of this agreement is on file, marked "Exhibit D," and is as follows:

EXHIBIT D.

This agreement, made this seventeenth day of May, in the year of our Lord one thousand eight hundred and seventy, by and between Milton S. Littlefield, of Duval county, State of Florida, and John P. Sanderson, of the same place, witnesseth that the said Milton S. Littlefield, in consideration of the covenants on the part of the party of the second part to be performed, doth covenant and agree to and with the said John P. Sanderson, that he will secure the said J. P. Sanderson the position of Vice-President in the Jacksonville, Pensacola and Mobile Railroad Company for the time and period of five years, or as President thereof, as the said Littlefield may desire, and paid to said Sanderson the sum of ten thousand dollars per annum for his services in that position.

And the said Littlefield further covenants and agrees to secure said Sanderson the position of President of the Central Railroad Company during the same period unless said company shall sooner be consolidated with the aforementioned company, in which event said Sanderson shall have the position aforesaid of the whole line of road, from Jacksonville to Mobile. And the said Littlefield futher agrees to retain and employ the firm of Sanderson & L'Engle as the lawyers and attorneys of said Railroad Company, and pay said firm the sum of five thousand dollars per annum for their services, and pay their necessary expenses when attending to the business of the company.

In consideration whereof, the said J. P. Sanderson covenants and agrees to devote his time and service when necessary to the management of said Railroad, and to render

all the service usually devolving on said position, and also to render at all times such aid and assistance as may be reasonably required in attending to the private interests of said Littlefield, and generally to advance the same to the best of my ability, it being understood that all the personal expenses incurred while attending to the business either of the Roads, or of said Littlefield, shall be paid by M. S. Littlefield, and it is further agreed that said Sanderson & L'Engle shall at all times give prompt attention to all the legal business both of said roads and said Littlefield whenever necessary or required.

It is also agreed the said J. P. Sanderson shall have the right to go North or elsewhere for the space of two months in each year if he shall desire so to do.

It is also agreed and understood that said service and retainer shall commence and date from the first day of Januay, A. D. eighteen hundred and seventy, and that the payments therefor shall be due and payable quarterly.

In witness, we have hereunto set our hands and affixed our seals, this the seventeenth day of May, in the year of our Lord, one thousand eight hundred and seventy.

M. S. LITTLEFIELD. [SEAL.]
J. P. SANDERSON, [SEAL.]

Sealed and delivered in presence of

ROLLIN STEWARD,
E. M. CHENEY.

The witness Littlefield, states that this contract remained in force up to the 15th day of April, A. D. 1871, and it appears from the testimony of L'Engle that Littlefield gave to the firm of Sanderson & L'Engle, a note for $5,000 under the foregoing contract.

Littlefield states in his testimony that a new agreement was made on the 10th of April, A. D. 1871, but it was not reduced to writing owing to Sanderson's illness. On this day, the 15th of April, A. D. 1871, Littlefield gave San-

derson drafts upon S. W. Hopkins & Co., for $58,133.33. These drafts this witness swears he gave to cover the amount agreed upon at a settlement had between Sanderson and Littlefield on the 4th of June, A. D. 1870, with some interest. The settlement of June 4, 1870, is shown by receipt of Sanderson, marked exhibit D, a copy of which is in evidence, and which is as follows:

"$57,560."

"Received of M. S. Littlefield, fifty-seven thousand five hundred and sixty dollars in draft on S. W. Hopkins & Co., 71 Broadway, New York, payable when in funds. When this draft is paid this will be a receipt in full to date for personal service, (amount thirty-five thousand dollars,) also for seventy shares of the stock of the Florida Central Railroad Company standing in the books of the company in the name of my wife, and interest to date, and the full balance due Messrs. Call, Baker and Niblack, for their interest in the Tallahassee Railroad, sold by me as attorney in fact to said Littlefield, but the item for personal service does not include the legal services of the firm of Sanderson & L'Engle, or for any service rendered under written contract with the said Littlefild.

"J. P. SANDERSON."

Littlefield, as to this receipt and settlement, and as to the sum of $15,000, testifies further, that in April, 1871, when he gave the drafts mentioned to Sanderson, the sums of money he had paid him in 1869 were spoken of, and it was agreed that he would render to me an account of the moneys he had received from me, as well as the moneys he had received from the companies. But he was not to refund any moneys. He was to apply them to the payment of the salaries of Sanderson & L'Engle, under the new contract to commence the 15th day of April, A. D. 1871, for professional services thereafter to be rendered.

On the 16th February, A. D. 1872, in a contract between

L'Engle and Littlefield, Littlefield covenanted not to make any claim for any moneys he had paid Sanderson, and Littlefield swears that this covenant referred to this sum of $15,000.

There is in the record a copy of a memorandum of an agreement to be made between the Florida Central Railroad Company and the J. P. & M. R. R. Co., of the first part, and John P. Sanderson and Edward M. L'Engle comprising the firm of Sanderson & L'Engle of the second part. This memorandum recites that the parties of the first part do retain and employ the parties of the second part and each of them as the counsellors and attorneys at law of the parties of the first part, for and during the term of three years commencing on the 15th of April, 1871, at a salary of $20,000 per annum, the firm of Sanderson & L'Engle to render prompt and faithful services as attorneys and counsellors at law.

The testimony of the witness establishes the fact that this contract existed until the death of Sanderson.

We think it is apparent from this testimony that no such sum of fifteen thousand dollas was due the firm of Sanderson & L'Engle by Littlefield or the Railroad Companies after the settlement of April 15th, 1871, and it may have been true that Littlefield or the interests which he represented might have recovered the excess beyond the amount due under the contracts, but Littlefield has yielded any and all claim to recover such sums by his agreement of the 16th February, A. D. 1872. This contract upon its face enures to the benefit of the firm of Sanderson & L'Engle to the estate of Sanderson, and to the surviving partner, L'Engle. The language is plain and beyond doubt. The money was paid to Sanderson for professional services. That is clear.

We do not see how L'Engle, his partner, can be denied his share of the money, upon the ground that it was more

than could have been collected of Littlefield or the interests which he represented. As to the contract of February 16th, 1872, there is nothing in it to prevent L'Engle's recovering his share of this money paid Sanderson for professional services. Whether Littlefield thought it was due or not, he paid it on that account, and Sanderson must account to his partner L'Engle for it. This sum having been paid to Sanderson on account of professional services, upon what principle can L'Engle be denied the right to his equal share of it unless it be on the ground that his claim as against the estate is barred by the statute of limitations, or the claim for some other reason good in law should not be enforced against the estate.

Such objections are made, but as the same objections apply to other items their consideration is postponed.

The next item which was disallowed by the court, and which appellant insists should have been permitted to stand as a charge against Sanderson, in his account with the firm of Sanderson & L'Engle, is the sum of $35,000, which appellant insists was received by Sanderson for professional services. The basis of this claim is the receipt of Sanderson for $57,560, (see exhibit E, heretofore inserted in this opinion,) and the testimony of Milton S. Littlefield.

Littlefield, as to this receipt, testifies, that on the 4th of June, A. D. 1870, he settled with J. P. Sanderson and gave an order upon S. W. Hopkins & Co., for $57,560. This order was not paid, and on the 15th day of April, A. D. 1871, he gave new drafts upon S. W. Hopkins & Co. for the amount of $58,133.33, and that these drafts were to cover the amounts agreed upon at the settlement on the 4th of June, 1870, and interest upon a portion of the account added.

This receipt states that it was given, first, in full to date for *"personal service,"* $35,000.

Second. For seventy shares of stock of the Florida Central Railroad Company.

Third. For balance due Messrs. Call, Baker and Niblack for their interest in the Tallahassee Railroad Company.

Sanderson, in this receipt, then states: "But the item for personal service does not include the legal service of the firm of Sanderson and L'Engle, or for any service rendered under written contract with said Littlefield."

By reference to exhibit D., (contract between Littlefield and Sanderson in former part of this opinion,) it will be seen that the firm of Sanderson and L'Engle were at the date of this settlement and had been since the 17th day of Mal, A. D. 1870, under a *written contract* with Littlefield to render service as attorneys at law at a salary of $5,000 per annum, and Littlefield, as we have before seen, swears that $14,600 dollars was paid on account of professional services rendered and to be rendered.

From this exhibit, viewed in reference to and construed with the other written evidence, it is apparent that whatever else the term "personal service" here used may indicate, it does not mean services as an attorney and counsellor at law. Sanderson, in the receipt given for the $35,000 for personal service, states expressly that *"the item for personal service does not include the legal services of Sanderson and L'Engle."* In addition to this, he says that it does not include service rendered under written contract with Littlefield, and at the time this receipt was given Sanderson and L'Engle were under written contract to render their services as attorney at law for the sum of five thousand dollars per annum. Littlefield accepted this receipt from Sanderson. Littlefield wrote it at Sanderson's dictation. He certainly must be held to have known its contents, and he is the only witness that knew anything of it at the time. But it is said that Littlefield's testimony is positive to the effect that Sanderson rendered "no other service for him than as attor-

ney and counsellor at law," and it is true that Littlefield so testifies in general language. We cannot, however, as against this receipt, which is consistent with the other written evidence, accept this or the other general declarations of Littlefield based upon his idea of what are the duties of an attorney at law retained by him. Again, exhibit E. and Littlefield's testimony show that Sanderson, as attorney in fact, did do service other than as an attorney at law. As attorney in fact he represented the J., P. & M. Railroad Company, and its President, under the agreement of the thirty-first of August, A. D. 1869, (see exhibit E. in previous part of this opinion,) and services, such as the active management of a railroad and the extension of a line of railroad, are not such services as would follow a retainer as an attorney and counsellor at law. Littlefield, upon his cross examination, states that if he employed an attorney at law to look after his interests in a railroad corporation, he should expect him *to do every and all things* when he was absent as well as when he was present, and if it was necessary to protect my (his) interests for the attorney to act as my attorney in fact, I should expect him to do it. This power of attorney (exhibit E.) bears date the 31st August, 1869. Littlefield says that during the years 1869 and 1870 he was absent from the State two-thirds of the time, and perhaps more; that Sanderson frequently advised him by letter upon the general condition of matters here, including the road; that he (Sanderson) frequently called for iron and material to extend the road, and that his (Sanderson's) principal object was to get a line of steamers from Jacksonville to New York. It is apparent from what this witness states that he misconceives the duty of an attorney and counsellor at law. We think the testimony shows that Sanderson did perform service in addition to his employment as an attorney at law, and that the receipt upon its face sustains the view that the $35,000 was not paid him

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land so early as the reign of Queen Elizabeth, (Baker's Chron., 411, Tom. Law Dic. title Broker,) and they are recognized by the laws of the United States, (13 Stat., 252, 472,) and of the State of Florida, (Chap. 3099, Sec. 11, Laws.) Under the acts of Congress a broker is defined by the Supreme Court of the United States as "one whose business it is to negotiate purchases or sales of stock, exchange, bullion, coined money, bank notes, promissory notes, or other securities, for himself or others." There is an implied warranty that what a broker sells is what he represents it to be, and should this stock here have turned out to be a forgery, Sanderson could have been held responsible; while L'Engle, we think, could not, because it was an act outside of and beyond Sanderson's business as an attorney at law. This concludes the items of account objected to as allowed or disallowed upon the appeal and cross-appeal, so far as the accounting arises out of the partnership accounts of Sanderson & L'Engle. The items of $35,000 and of $1,200 being, as we think, under the evidence not proper charges against Sanderson in the partnership accounts, it is unnecessary to say more of them. As to the other items of $14,600 charged to Sanderson in the firm accounts as moneys received in his relation as a partner in the firm of Sanderson & L'Engle, it is contended:

First: That it is barred by the statute of non-claim and the statute of limitation.

Second. That it is a stale claim which a court of equity ought not to enforce.

If we understand the proposition of the respondent as to the statute of non-claim, it is to the effect that an administrator, with the estate in his hands for the purpose of administration, must present to himself or to the Probate Court, his claim against the estate within the time limited, or it will be barred like the claim of any other creditor. The proposition, that an administrator must prove his debt

when he claims to retain out of the assets is correct, but the proposition that he must necessarily present and prove his claim within two years, if the exigencies of the estate require his possession of the assets beyond that time, we cannot sanction. Under our statutes, except in insolvent estates, there is a right to retain. If a debt exists, we think his right to payment at least co-extensive with his right to retain, and this exists as a general rule so long as he has assets in his hands. It is a right incident to the possession of assets, as we understand it. This is the disinction between himself and other creditors, and his right to retain results from the fact that "it were absurd and incongruous that he should sue himself, or that the same hand should at once pay and receive the same debt." 6 Fla., 29; Williams on Ex., 6 Am. ed., 1040, 1050, and cases cited; 53 N. H., 531; 8 Bush., 564; 24 Vt., 402.

As to the operation of the statute of limitations. The right of action to recover any of this money did not accrue until Sanderson received it and held it under the agreement to expend it for professional services. We do not propose to decide when it did accrue, but it certainly did not exist before that time. This agreement was made in the spring of 1871, and Sanderson died in June, 1871, and L'Engle was appointed administrator in November, 1871. The claim, therefore, was not barred at Sanderson's death, or when the administrator was appointed. Not being barred at that time, the administrator had a right to retain its amount from the assets in his hands, as neither the statute of non-claim nor the statute of limitations contemplate that he could sue himself, or require a presentation of a demand due himself to himself, or a filing of the account in the Probate Court. This case does not involve the question whether an administrator can retain for a debt barred by the operation of the statute during the lifetime of the intestate, or at the time he was appointed. The extent to which

we go is to say that if not so barred at either of these dates, the statute of limitations will not operate to bar it by adding to the time which elapsed before his appointment the time which expired before a final settlement of the estate is had.

It is held by the Supreme Court of Alabama in the case of the Distributees of Knight vs. Godbolt, Administrator, 7 Ala., 304, that "an administrator, when cited to a final settlement by a distribuee, is entitled to show a retainer of assets for any just debt due to himself, although within the bar of the statute of limitations, so that it is without the period of time when the presumption of payment would arise." The Supreme Court of Maryland says: "So long as the creditor is administrator, the statute of limitations can have no effect upon the demand; such cases are exceptions to the rule that when the act begins to run against a claim, nothing arrests its operation." 10 Maryland, 243. The statute of limitations does not run in some cases when the right of action is suspended. 11 S. and M., 10; 12 Wheat., 134; 4 Har. and John., 393; 1 Har. and John., 337; 5 Bar. and Ald., 204. Here the executor could not sue himself. His right was other than that of an ordinary creditor to sue the legal representative of the intestate, or to exhibit his claim to him. His right was to retain without suit or presentation, and, upon final settlement, to have his claim satisfied, if a presumption of payment does not operate against him.

It is held that the statute stops running in his favor if he owes the estate, (3 Cranch, C. C., 371,) and it should stop running in favor of the estate if it owes him. It is insisted further that a court of equity should not allow this claim on account of laches and the doctrine of stale claim arising from unexplained acquiescence.

The fair conclusion from the proof here is that L'Engle did not know of the existence of this sum as an asset of

the partnership until after the commencement of this suit. His failure to demand it before is fully explained. This disposes of all matters of account arising in this case out of the partnership of Sanderson & L'Engle, and the rights of L'Engle, the administrator, arising out of his relation as a creditor of the intestate.

We proceed next to examine the objections to other items of the account of the administrator allowed by the court, and which are before us on the cross appeal of the complainant. The plaintiff objects in her cross appeal to the allowance by the court of five items of the administration account.

The two grounds upon which this objection is based in the petition of appeal are that "it is not shown that they were presented within two years from the publication of notice to debtors and creditors, and that at the time *they were paid* they were barred by the statute of limitations." To these grounds the complainants restricted themselves in their original briefs in the cause filed on the 14th of January, A. D. 1880.

An additional ground is urged against the action of the court by complainants in an additional brief filed on the 27th January, A. D. 1880. This ground is that the debts were not proved. No application to amend the petition of appeal in the cross appeal was made. These grounds are suggested in an additional brief and no where else. There is nothing in the record of the action of the Circuit Court which discloses such an objection. On the contrary, this objection might have been urged against a majority, if not all of the claims embraced in the accounts of the administrator filed in this cause.

The appellant in the cross appeal, plaintiff in the Circuit Court, not only did not make any objection to these items, (excepting the Baxter debt,) upon the grounds urged in the supplemental brief, but in the Circuit Court treated all

claims embraced in these accounts as being admitted, so far as this objection is concerned. Had this objection been made there the administrator might have obviated it.

The rule of this court in such cases is to restrict the party to his petition of appeal. While it is within the power of this court "to consider points made here for the first time, if raised by the pleadings and proofs, yet care must be taken that neither party be permitted to surprise or mislead his adversary, or to make objections which, if made in the court below, might have been obviated." 4 Fla., 359; 18 John., 558.

This objection made here, so far as we can see, for the first time, is of that character. It is not urged in the petition of appeal and we will not under these circumstances consider it.

As to these accounts, (with the exception of the Baxter claim) we deem it unnecessary to enter into any discussion of the items in detail.

As the case must be remanded with directions to state an account, it is only necessary to announce the principles of law which we think control the subject. It is settled in this State that an administrator has no authority to bind the estate of the intestate by a promise to pay a debt barred by the statute of limitations before the death of the intestate. 4 Fla., 488.

All such charges, if any such there be in these accounts, will therefore be rejected. When the statute has not run in the life time of the intestate, and the cause of action survives, *then it ceases to run after his death* until an administrator is appointed; and, upon his appointment, the action under the statute must be brought "within one year after the issuing of letters of administration." Sec. 15, Chap. 1869, Laws.

The terms "after the expiration of that time" in this section are limited by the terms "within one year after

issuing letters of administration." The terms "after the expiration of that time" in this section are there to make it clear that even if a greater length of time than the general limitations has expired after the death of the intestate, and before letters of administration are issued, yet, in cases where the limitation has not operated in the life time of the intestate, the time between his death and the issuing of letters shall not be estimated. The letters in this case were issued November 7, 1871. The time limited for an action under the 15th section of the act against this administrator, therefore, was the 7th November, 1872. An action brought against this administrator is not an action "heretofore barred by statute, or that will be barred within sixty days from February 27th, 1872," within the meaning of the 19th section of this act, and hence this action is *at once affected* by the limitations of the act of February 27th, 1872, as all actions not excepted by the 19th section are under its terms, affected by its limitations. If, however, during this period of twelve months there has been a presentation of the claim to the administrator, we think it takes it out of the statute. Upon the qualification of the administrator he is, with reference to causes of action of this character, controlled by two statutes—the statute of non-claim and this statute of February 27th, 1872. It has been the practice in this State since its organization to require of a creditor nothing more than a presentation or exhibition of his claim to the administrator. This stopped the operation of the statute of limitation and of non-claim. It has never been held in this State that the creditor after presentation must reduce his debt to judgment. As remarked by the Supreme Court of Mississippi, "the accumulation of unnecessary costs and the sacrifice of the interests of heirs would be the natural result of such a policy." (40 Miss., 716.) Such is the doctrine of the Supreme Court of Wisconsin. 29 Wis., 64.

It is true the opposite rule prevails in some of the States, but this view is in conformity with our practice, and we think, looking to all the interests involved, that it is the correct rule. By "exhibition" or presentation is meant "such notice to the executor or administrator of the existence of the debt or demand, its character and amount, as would enable him, with reasonable certainty, to provide for its payment." 3 Fla., 106.

In speaking of a like clause in a statute in New York, Mr. Justice Bronson, for the Supreme Court of that State, says: "There is nothing in the statute which necessarily requires a personal interview between the claimant and the executor, nor that the evidences of the debt should be laid before the executor unless he requires it. Where the executor already understands the whole matter, and does not desire that the evidence should be submitted to his examination, it cannot be necessary for the creditor to do more than to present his claim; and that may be done through an agent, by a written communication, or in any other way which deals fairly with the executor and the interests which he represents. If the presentation is made by letter, the executor is bound to deal ingenuously with the creditor. If he wishes to see the evidences of the debt, or to have the oath of the creditor to the justice of the claim, he should say so, and not leave the claimant to suppose he has done everything that is wished and afterwards object that there has not been a formal presentation of the demand." In addition to this it may be remarked that the administrator does not represent the heir as against the creditor. He is under no obligation to the heir to resort to any artifice to benefit the heir at the expense of the creditor. Indeed, if there is any difference it is in the creditor's favor, as his claim must be satisfied first.

In addition to what I have already said as to the statute of limitations, I will remark that the general rule seems to

be that an administrator is not bound to plead the general statute of limitations in bar of an action to recover a debt otherwise justly due. 13 Mass., 164; 40 Miss., 711; 13 Mass., 162; 23 Pen. State, 95; 9 Maryland, 317; 2 Kent's Com., 416, note c; 3 Met., 369; 8 Bush., 564; 4 Har., 368; 10 Maryland, 262; 5 Jones' Eq., 168; 3 Ind. Eq., 442; 10 Humph., 301; 11 Leigh, 1; 28 Ala., 484; 49 Miss., 48; 8 How., (U. S.) 402, 411.

The dictum in 9 Darling & Ryland, alluded to by the Supreme Court of the United States in the case in 8 Howard, was disapproved in 4 Kay. & J., 166. As a matter of course, this rule of law cannot operate in this State to revive a debt barred in the lifetime of the intestate, because this court as we have stated has decided otherwise, nor do I think that this rule can operate as to the limitation fixed in the 15th section of the act of 1872, (chapter 1869, laws,) because while the section is embraced in the general statute of limitations, it is still a statute which limits the time when an action can be brought against an administrator *in his representative capacity and as administrator.*

I can find no exception to the rule that in such case the administrator must plead the statute, (13 Mass., 162; 11 N. H., 208; 39 N. H., 428; 4 Allen, 359; 5 Pick., 140; 16 Ill., 318; 48 N. H., 25; 9 Mo., 262,) and hence in my opinion he must be charged with all such claims as he has paid, and which were not presented within twelve months after his letters issued.

The majority of the court think the limitation of a year does not operate in case where, anterior to the passage of the act of 1872, the administrator has given notice requiring the exhibition of claims. I cannot see how the notice given by the administrator deprives the legislative department of the government of the power to fix a shorter and

reasonable time, (in this case from two years to eight months,) for the presentation of the claim.

I cannot see that the notice is in any sense a contract, or that any obligation of a contract arises from it. I think it a mere statutory provision, based upon no consideration between the creditor and the administrator, and like any other statute giving directions in the matter of the winding up of the estate, is subject to modification by the legislature. I have not given to this question that thought and examination which its importance demands, as the view of the majority of the court is to be the law of the case, whatever may be my conclusion. I will, however, say that the 15th section of this act, considered with reference to estates upon which letters of administration had been granted before its passage, as well as the provisions of the 19th section, any sensible construction of which makes the act have a retroactive operation, are eminently illiberal and unjust to creditors.

In addition to the objections arising under the statute of limitations mentioned in the petition of appeal, as applicable to the other claims to the allowance of which objection is made, the item of $453.55, paid by William A. McLean, attorney for the Baxter estate, is objected to on the ground that there is no evidence that it was a just demand against the estate. There appears in the testimony a receipt of William A. McLean, as attorney at law of the Baxter estate. The circumstances surrounding the claim and its payment, as appears from the testimony, are substantially as follows:

Judge McLean testifies: "My connection with this matter as attorney, commenced during the lifetime of Sanderson, with E. M. L'Engle the law partner of Sanderson, and by direction of Sanderson. There were some items that we could not settle at that time, and as I did not have the data and the Baxter heirs were absent, some in New York, and

some in New Jersey, I corresponded with them but failed to complete the settlement before Sanderson's death; after his death Thomas W. Bell, husband of one of the Baxter heirs, came to Jacksonville with powers of attorney from all the heirs giving him full power to represent them. The settlement with L'Engle, administrator, was made by Bell, Fleming and Daniel, I think, representing L'Engle. I having been counsel in the case before the death of Sanderson, and at that time still representing the Baxter heirs in other matters, L'Engle preferred that I sign the receipt which I did in order that the settlement might be made. Not one dollar of the money represented by this receipt did I receive for services, my fee having been paid to me before Sanderson's death." The testimony was called out upon the cross-examination of this witness *by complainant.*

L'Engle testifies that the testimony of Judge McLean, as to this claim, is substantially correct. In the transactions between Judge McLean and himself before the death of Sanderson, he represented Sanderson simply as a friend. The settlement at that time was incomplete. S. D. McConnell, then a clerk in the office of Sanderson & L'Engle, did the principal part of the work in the settlement. The money had been collected by Sanderson in his professional capacity out of business placed in his hands before our partnership. Sanderson had never accounted to his clients, and was deficient in memoranda by which to make an account. Sanderson was very ill and could not give it personal attention. After his death, when called upon by Mr. Bell, I (L'Engle) requested Fleming & Daniel to examine into the matter and advise me what to do. I told them that it being a demand against Sanderson, as an attorney, for trust funds, that it was desirable a settlement should be made, if possible, without suit, for the protection of Sanderson's memory and character. Fleming & Daniel, in writing, advised me (L'Engle) to pay what I did. This written advice

is filed. That Sanderson admitted the indebtedness to the Baxters. It was his credits that he could not recollect. He admitted a large indebtedness. Sanderson had received for Martha B. Baxter as her attorney at law money from Hoeg, from Charles Wiley, John S. Samis and A. M. Reed, the whole amounting to more than $4,000. This was the money about which the partial settlement above stated was made between McLean, representing the Baxter interest, and myself as Sanderson's friend, before the latter's death, concerning which I took the advice of Fleming & Daniel. Sanderson's business with Mrs. Baxter was very much confused and involved. He could not state the account, and the amount of the indebtedness was unascertained when he died. This witness, being asked to state at what time and in what amounts the money was received by Sanderson, answers that money was paid by Sanderson at the time of the partial settlement between McLean and himself. He says I do not recollect the time at which it was paid, but probably through himself, stating that he might probably ascertain by reference to the checks drawn and the memoranda upon them. Upon subsequent cross-examination, the witness having at a former date been asked to produce any check or order or other evidence of the payment of money on account of the Baxter claim received by him from Sanderson, said I have not ascertained what payments were made by John P. Sanderson in his lifetime on account of the Baxter claim. I have no means of getting that information. I have ascertained the amount I received from him to be applied to that claim. I received $802.64, which was paid as an approximation from the data then at hand of the amount due by Sanderson. Of this amount $454.12 was in accounting with Baxter's attorney, McLean, applied to an indebtedness of Martha B. Baxter, held by Sanderson and L'Engle, and $348.52 were paid to McLean as such attorney. The funds were received by me from Sanderson May 25th, 1871, and

the application was made May 31st, 1871. I received the funds by check of Sanderson on D. G. Ambler. The check was drawn payable to me or bearer and contained in parenthesis the words, "Baxter accounts," in my handwriting. The entire check was filled up by me. Samuel D. McConnell, for defendant, swears that Sanderson kept his accounts in a very loose manner; that he, McConnell, was temporarily engaged in the office of Sanderson & L'Engle in 1871; that a short time before Sanderson was disabled from attending to business, he asked me to assist him in making out a statement for a settlement between himself and the representatives of the estate of Baxter, which involved a considerable amount of money. He and I worked at it altogether for several hours, he relying upon his memory as to the various transactions connected with it. We had a great deal of difficulty in adjusting the account, and finally did so by approximation. That was a professional matter of his own, and not of the firm of Sanderson & L'Engle. I mean by the approximate statement of the Baxter account that it was impossible to make up an accurate statement, such as could have been made from books properly kept, but that the balance was arrived at approximately from his recollection. The representatives of the Baxter estate were not present. I only assisted Sanderson in making up a statement in order that he might be prepared for a settlement. The statement of the account was made in writing. It was made in the office, and I had nothing more to do with it after I made it. I do not know where it is. My recollection is that the difficulty was in fixing dates and exact amounts of money paid to Sanderson so as to fix the commission and interest account. I only remember that the moneys came into Sanderson's hands through professional transactions between him and the estate. This witness says that during the latter part of Sanderson's life his memory failed him. The receipt

for the amount of this claim signed "W. A. McLean, attorney for Baxter estate," recites that it is upon a "full settlement of the indebtedness of the estate of Sanderson to the estate of Martha B. Baxter, after rectifying errors in account heretofore stated," is dated December 28, 1872, and appears in the record. There is also in the record a paper signed Thomas W. Bell, attorney in fact, purporting to be executed by virtue of a power of attorney from "the executors of the estate of M. B. Baxter," which ratifies and confirms the receipt of McLean as a "full settlement of all claims of M. B. Baxter against the estate of John P. Sanderson." There is also in the record a paper signed by Fleming & Daniel stating that they "have examined the accounts and vouchers in the matter of a contradicted balance between the estate of John P. Sanderson and the estate of M. B. Baxter, and, after satisfying ourselves in regard to the facts, are of the opinion that the sum of four hundred and fifty-three and fifty-five one hundred dollars is due by the estate of Sanderson to the estate of Baxter. This amount we advise to be paid to William A. McLean, Judge of the County Court for Duval county, on his receipt ratified and endorsed by Thomas W. Bell, as attorney in fact, for the executors of the estate of M. B. Baxter." It appears from this testimony that the claim of the heirs of M. B. Baxter against the estate of Sanderson was for moneys which Sanderson, as attorney at law, had collected during his life time, and for which there was a partial settlement made before his death. Sanderson did not keep books in which he made accurate, cotemporaneous entries of his business. During the latter part of his life, and when his memory was impaired by sickness, he, with the assistance of a bookkeeper (McConnell), made a statement of the account from memory and some memoranda in the absence of any representative of the estate. A partial settlement was had and

a payment through L'Engle of the sum of $802.64 was made on the 25th May, A. D. 1871.

The statement of account made by Sanderson and McConnell was in writing, but is not evidence. McConnell says he does not know where it is. Sanderson at the time was unwell and unable to attend to general business. After Sanderson's death a settlement was made by L'Engle with the parties interested in the Baxter estate through their attorney in fact, Thomas W. Bell, Fleming & Daniel representing L'Engle. Fleming & Daniel, after examining the accounts and vouchers in the matter, advised the payment of $453.55 in settlement of the account, and the payment was made. L'Engle testifies that Sanderson had received as attorney at law of M. B. Baxter over $4,000.

This testimony establishes that something was due in addition to the payment of $862.64, but it does not establish that the amount paid was due. The only testimony that proposes to show the amount that was at any time due the estate by Sanderson, is that of L'Engle, and the payment stated upon Sanderson's approximate statement.

It certainly cannot be a fair conclusion from this testimony, that any such sum as $4,000 was due at the date of the partial and approximate settlement in view of the fact that only $862.64 was paid then, and in view of the further fact that the amount paid in full settlement thereafter was the sum of $453.55, making a total of only $1,256.19. L'Engle's testimony is too indefinite as to the date when the $4,000 was due for us to base any conclusion upon it. It is not consistent with the balance of this testimony, unless, which we think was the case, L'Engle alluded to all of the sums collected by Sanderson as attorney for this party during this employment. His testimony amounts to nothing more than that Sanderson received $4,000 as attorney at law, but what part of it was due at Sanderson's death, the subject of enquiry here, is not shown. The only

evidence here that the sum of $453.55 was due is its payment. The letter of Fleming & Daniel, stating that they find such a sum to be due, is hearsay. It is the indebtedness to be established, and this does not do it. The letter is no more than the statement of an individual. The settlement of this claim as shown by exhibit Y, was not approved by the Probate Court until the order of June 1, 1876. This suit was pending before that time, and independent of any question as to the disqualification of the Probate Judge in the matter of passing this order, we are satisfied that the rule of law is that an order of this character, made by the Probate Court while this suit was pending in a court of chancery, does not give to the accounts approved any additional force or validity. The master in chancery in such an event should reject all items not established by competent testimony. 1 Brock., 500; 5 Mon., 577; 2 Phillips on Ev., 4 Am. ed., C. & H. notes, page 81, note 289.

Thus disposing of these particular items of account and the question of statute of limitations, we reach the general question of accounting. An accurate examination of the cases in this State up to 1857, (5 Fla., 564; 4 Fla., 112,) and of the statute, (Thomp. Dig., 207, sec. 9, No. 2,) regulating the investment of moneys in the hands of an administrator will show, that both the decisions and the statute regulating the nature of securities for moneys loaned by them, relate to the money of *minors* in the hands of administrators. So far as adult heirs are concerned, the statute I think makes no provision and prescribes no restriction as to the nature of the securities upon which administrators may loan money of the estate in their hands, in which such adult heirs have no interest. As to their general duty in this respect the statutes (Thomp. Dig., page 207, sec. 9, and chap. 1013, laws,) require that they shall make their annual returns at any time before the first day of June, in each

year, and their liability is the general liability of an administrator in a court of equity in reference to funds in his hands. This is my view; but this court in Moore & Monford vs. Felkel, et ux. 7 Fla., 44, held that the statute was applicable to adult heirs or distributees, and after the lapse of twenty-three years with no legislation upon the subject, we should follow that decision. That case involved this point and this precise question was there raised and decided. 7 Term Rep., 242; Show. Par. cases, 154; 1 Kent Com., 476; 16 John., 402; 1 Yerg., 376; 5 New York, 389; Cool. Con. Lim., 52.

In the case of Moore & Montford vs. Hamilton, 4 Fla., 119, this court remarked that the statute not only restricted "the power of executors to mortgage security, but as a further protection of the interests of minors, very properly annexes to the exercise of that power the sanction and approval of the Court of Probate." The investments made by L'Engle without the approval of the Judge of the Probate Court are such as the complainants here may accept or reject. A court of equity will not compel them to take any security but that which the law required the administrator to take; and, in the case of unauthorized investments, the heirs are not limited to the rejection of *all* or *none* of them, but may accept such as they choose and reject the others. 40 N. Y., 91.

As to the unauthorized securities accepted or to be accepted, the acceptance, as a matter of course, ends the question as to them. As to the securities rejected, there are two remedies which the distributees may have. First, Under the general principles of equity they are entitled to receive all such sums of principal and interest as were at any time actually paid to the administrator upon such rejected securities. This is true because such principal is the money of the estate, and such interest is the result of the use of the money of the estate in which the distributees

have such right. Such sums received, the administrator will be charged with in his general yearly account, and they will enter into his yearly balances. From the time, however, that such interest ceases to be paid upon the security, in the event the distributee, at her option, chooses to take actual principal and interest paid, the administrator will be charged nothing more than simple interest. In other words, the administrator will not be charged with compound interest upon sums *not received by him.* As I understand the decisions of this court in the case of Moore and Montford vs. Felkel and wife, 7 Fla., 68, compound interest was not there charged upon the uncollected note of Craig & Lockerman.

Without entering into discussion of the subject, we will say that there is nothing in this case which should induce a court of equity to direct such charge by way of penalty, and I know of no rule of law to otherwise authorize it.

The other remedy or right of the distributees is such as the statute, under the decision in the case of Moore and Montford, executors, vs. Felkel and wife, gives them. Under that rule the distributees may reject the unauthorized investment, and the administrator may be charged with the amount invested in the security in his accounts, with annual rests and interest thereon to be calculated as authorized by that decision.

As to the general accounting. Interest at the rate of 8 per cent. will be charged, the interest upon the balance found at the beginning of a year to be carried into the balance struck at its close, computing interest for the next year upon the whole; no interest being computed upon the sums when received. Young's Admr. vs. McKinnie's Admr., 3 Fla., 557.

If any sum is found due by L'Engle to the estate on account of his relation as partner in the firm of Sanderson & L'Engle, it will bear simple interest at the rate of 8 per

cent. This is not the case of an ascertained debt due by the administrator. The debt here, if any exists, involves an accounting to ascertain it, and arises from a partnership relation. L'Engle cannot compound interest on his claim against the estate, and the estate certainly should not compound interest on L'Engle's debt to it.

Wherever either heir or distributee puts the administrator to proof of a voucher, regular and proper on its face, the payment of which is sworn to by the administrator, such heir or distributee, in the event the claim is established, should be charged with all costs attending such proof.

One other question remains and that is, whether the administrator, E. M. L'Engle, is a competent witness; and, if so, to what extent?

The testimony of L'Engle, so far as it recites any transaction or communication between himself and the intestate, is objected to upon the ground that it is not admissible under the provisions of section 1, chapter 1983, laws. Under the act in force (chapter 1816) anterior to this statute, it was provided that there should be no exclusion of any witness in a civil action because he was a party or interested in the issue to be tried.

Chapter 1983 does not in terms repeal this act. Chapter 1983 provides that no person offered as a witness in any court, or before any officer, acting judicially, shall be excluded by reason of his interest in the event of the action or proceeding, or because he is a party thereto. It is thus apparent that this portion of the section did not change essentially the existing law. Following this general clause is a proviso: "That no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and

the person at the time of such examination, deceased, insane or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic."

The effect of this proviso or as it is called in the act "prohibition," was to restrict the general competency as witnesses of parties and interested persons, or persons through whom parties and interested persons claimed, to transactions or communications other than those with a person deceased, insane or lunatic, when the action was against the executor, administrator, heir at law of such deceased person, or the other parties named. The act, however, further provides "that this prohibition" (meaning the proviso just stated) "shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin" and other parties above named, "shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic, shall be given in evidence." Under the provisions of this last clause the prohibition is restricted in its operation, and is made inapplicable to cases where the administrator shall be examined in his own behalf as to any transaction of the deceased. In other words, the statute contemplates that the administrator may voluntarily become a witness as to a transaction of the deceased in a suit against him, the administrator as the representative of the deceased, and when he makes himself such witness, the adverse party or any person interested, or any person through whom the adverse party or interested person claims, may be examined as to such transaction or communication. If this power of the administrator to become a voluntary witness exists in all cases, and as to all transactions, then all of the testimony of L'Engle in this case is admissible. We do not think, however, that an administrator is a competent witness un-

der this statute to establish his own individual debt against the estate. While technically and as a matter of form he is the representative of the estate in this suit, still when he goes into the master's office to establish his debt against the estate he becomes an actor against the heirs and distributees in his *personal capacity* as distinct from his *representative capacity.* He occupies there strictly the relation of a creditor, seeking to establish his personal debt against the estate, and like any other creditor, he is not competent to speak to any transaction or communication of the deceased as to his own claim unless the heirs or distributees seek voluntarily an examination on their own behalf as to such transaction, in which event, like any other creditor of the estate when sued by the heir, he becomes a competent witness to such transaction or communication.

When, however, the justness of a claim of a creditor, other than himself, which he has paid, is denied by the heir of distributee, then the administrator may testify as to transactions and communications with the deceased in reference to this claim of the creditor which he has paid. This last case is, we think, within the letter, as well as within the spirit of the statute, when it allows the administrator to testify. When, therefore, in this case L'Engle testifies as to transactions and communications with the deceased as to his *own claim against the intestate,* his testimony is, we think, inadmissible, except as to matters to which the plaintiff, the heirs, are examined on their own behalf. As to these he is competent. He is a competent witness as against the heir, when he testifies as to transactions or communications of the deceased in reference to the claim of a third party, a creditor, other than himself, which he has paid. If the creditor had sued him directly he would have been a competent witness. The letter of the statute permits him so to be, and we see nothing to justify us in holding that this case, like that of his own claim, is in-

tended to be embraced in the prohibition. As to his own claim, he stands as an individual seeking payment at the hands of the estate. As to the claim of the other creditor, he neither had nor has any other relation to it but that of administrator, and the statute, in express words, permits an examination on his own behalf in such case.

This statute is taken from the New York Code (sec. 399.) We have examined all the decisions of the courts of New York which we have, and find nothing against this conclusion.

The decree is reversed, and the case will be remanded, with directions to the Circuit Court to permit the minor to be made a party, to permit the widow to amend the bill by making such allegations as will show that she has elected a child's part, and for further proceedings consistent with this opinion and conformable to law.

THE CHIEF JUSTICE delivered the following supplemental opinion:

I agree with the conclusion deduced from the opinion prepared by Mr. Justice Westcott, that it is clearly within the province of the Legislature to abridge the statutory period of limitation as to causes of action already accrued at the time of the passage of the act so affecting the limitation; *provided*, the act gives a reasonable time after its passage within which actions may be commenced. The statute of non-claim gave creditors two years from the issuing of letters testamentary or of administration in which to present their claims. The 15th section of the act of limitations of 1872 requires actions to be commenced against executors and administrators within one year from the issuing of letters. While this is regarded as a valid statute, in so far as it may abridge the period of the statute of non-claim to one year, yet, in cases where letters had been issued

and notice to creditors that claims must be presented within two years had been duly given, as required by the statute of non-claim, before the taking effect of the act of 1872, the latter act (section 15) does not apply so as to cut off the right of creditors to present their claims within the two years allowed by such notice.

While the statute of limitations is not a contract, and does not control its terms so as to prevent a reasonable change of the time for presenting claims or commencing suits, the notice to creditors by the administrator or executor under the statute in existence at the time notice is given may be considered as in the nature of an agreement between the estate and the creditors as to time for presenting claims, which cannot be changed by a legislative act to the disadvantage of creditors.

VANVALKENBURGH, J., concurs in this conclusion.

SAMUEL B. REDDISH, APPELLANT, VS. JAMES H. RITCHIE, APPELLEE.

A non-negotiable note, secured by mortgage, in the hands of an assignee for value before it is due, is subject to the equities existing between maker and payee.

Appeal from the Circuit Court for Alachua county.

The facts of the case are stated in the opinion of the court.

Thrasher, Davis & Hampton for Appellant.

R. F. Taylor for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

The appellant brought his bill in the Circuit Court of the State of Florida, for the Fifth Judicial Circuit, against James H. Ritchie, the respondent, alleging that in January, A. D. 1878, Ritchie was indebted to Reddish in the sum of twelve hundred and fifty dollars, as shown by a promissory note for that sum payable on November 1st, 1879. A copy of the note is appended to the bill, and it is not payable to bearer, or the order of the payee, but is payable to him alone. In other words, it is a non-negotiable note. Plaintiff alleges further, that to secure the payment of this note Ritchie executed to Reddish a mortgage upon about 280 acres of land in Alachua county; that on the first of January, A. D. 1879, the note with the mortgage was transferred for a valuable consideration in due course of trade by Reddish to T. B. Tillis; that after said transfer Ritchie recognized and acknowledged Tillis as the true owner and holder of the note and mortgage and paid him ,(Tillis,) the sum of $261.06, claiming the balance of the note as a debt justly due, and secured by the mortgage. Plaintiff prays a foreclosure and sale, and application of proceeds to his debt.

The defendant answering, admits the execution of the note and motgage, but denies that Tillis is a *bona fide* assignee of the mortgage as alleged, affirming that it was obtained by him of Reddish, by means of fraud, force and threats. Defendant admits the payment of $261.06, but denies that he at any time admitted Tillis to have been the true owner. He alleges that he has paid all that was ever due on the note, and that the consideration of the note beyond the $261.06 has already failed, and that of this Tillis had notice, when he received the note. He alleges that on the 24th January, A. D. 1878, he agreed to purchase

from Reddish 80 acres of land in Alachua county, for $1,000, the said Reddish, who was not able at that time to make a title, giving him bond for title. That defendant being then indebted in the sum of $250, added this sum to this $1,000, making the sum of $1,250, which is represented by the note upon which suit is brought. He alleges further that Reddish has utterly failed to make any title to the said land or to deliver possession, the title being in the United States, and that of this, Tillis, the assignee, had notice; that on the 11th of November, 1879, Reddish executed and delivered to defendant a release from all liability upon the mortgage, reciting in said release a payment of the note. After replication, evidence, and hearing the bill was dismissed. Upon appeal a reversal of the decree is asked here upon the simple, general, allegation of error, without any specific statement of the specific errors deemed to exist.

Tillis, the assignee, and Reddish, the assignor, of this non-negotiable note, were examined as witnesses for plaintiff, and Thomas H. Fletcher, B. J. Earle, James Ritchie, Samuel J. Kennard, Benjamin B. Boulevare and James H. Ritchie, were examined as witnesses for the defendant. The testimony comprised fifty-nine pages. This testimony we have examined and analyzed carefully, and without commenting at length upon it we will say, that the manifest and clear weight of the evidence shows the facts to be as follows:

On the 24th January, A. D. 1878, James H. Ritchie, for the sum of $4,000 purchased three hundred and sixty acres of land of Samuel Reddish. Ritchie paid fifteen hundred dollars cash and gave his two notes for $1,250 each for the balance. One of these notes has been paid and the other Reddish transferred and assigned to T. B. Tillis, on the 3rd of February, A. D. 1879. The note was due on the first of November, A. D. 1879. To secure the payment of the two notes Ritchie gave the mortgage to foreclose which

this suit was brought. The mortgage covers two hundred and eighty acres of land purchased by Ritchie. The title to eighty acres of the land was in the United States, but it had been settled upon as a homestead by the daughter, and son-in-law of Reddish. Reddish gave a bond to Ritchie in the sum of $1,000, that being the valuation placed upon the 80 acres by the parties, to make title to this land. These parties subsequently surrendered their homestead certificates, having abandoned the homestead, and the land is now occupied by other parties, the homestead entries having been cancelled. Reddish surrendered the homestead certificats to Ritchie, but this was no compliance with his bond, nor did Ritchie accept it as such. The certificates were subsequently cancelled by the United States. Reddish thus placed it beyond his power to comply with his bond. There is, therefore, a failure of consideration to the extent of one thousand dollars. The excess beyond this sum on the note has been paid.

As between the maker and payee of this non-negotiable note, no portion of this one thousand dollars could be recovered. Such is also the rule between the maker and the assignee of the payee. The assignee taking such a note befor it is due, takes it subject to this equity. It is the well established doctrine that the assignee of a non-negotiable note takes it subject to the equities existing between the maker and the payee, so far as they arise out of the transaction in connection with which the note was given. A mortgage being given to secure the note, does not change the rule. 1 Parsons on Contracts, 195, 198; Edwards on Bills, 208, 209.

The decree is affirmed.

RICHARD L. WILSON, ET AL., APPELLANTS, VS. GEORGE W. SPARKMAN, APPELLEE.

The Constitution of 1868 gave the County Courts jurisdiction in civil actions where the amount in controversy did not exceed $300., Where a note sued on was for $300 and interest, and not reduced to the sum of $300 or less by proper credits or payments, but the whole amount due was claimed, and judgment entered therefor, such judgment is void for want of jurisdiction, and its execution is properly enjoined.

Appeal from the Circuit Court for Alachua county.

The facts of the case are stated in the opinion of the court.

Thrasher, Davis & Hampton for Appellants.

R. F. Taylor for Appellee.

THE CHIEF JUSTICE delivered the opinion of the court.

This was a bill in equity filed by appellee for the purpose of enjoining defendants, appellants, from executing a judgment against one Pardee, by levying upon land formerly owned by Pardee and now owned by appellee.

The judgment was rendered in the County Court of Alachua county, while that court had jurisdiction in "civil cases where the amount in controversy does not exceed $300." The language quoted is from section 11, article VI., of the Constitution of 1868.

The judgment was rendered by the County Court for $334 damages and $10.04 costs. The declaration in the case was upon a note for $300, dated April 8, 1868, payable December 15, 1868, with interest at eight per cent., upon which no payments or credits were made, and the amount

claimed was $300 and interest. Declaration filed in July, 1869, and judgment was entered in September.

It was decreed by the Circuit Court that the execution be enjoined as against the property of the complainant upon the ground that the County Court had no jurisdiction of the cause of action, and that the judgment was null and void. The language of the Constitution was that "the County Court shall have jurisdiction of all misdemeanors and all civil cases where the amount in controversy does not exceed three hundred dollars."

It is claimed by appellants that because the note or contract sued on was for $300, exclusive of interest, the amount in controversy was only $300. The rule controlling the jurisdiction of the County Court was, that if by the terms of the contract sued on the amount actually due was in excess of $300, the court had no jurisdiction of the cause of action. Here the sum due by the express terms of the note was over $300 at the time suit was commenced. The declaration shows this, and claims the amount due for principal and interest. This was alleged to be the amount unpaid and payable, and is, therefore, the amount involved in controversy.

Appellants cite several cases as authority for the position that the principal of a note, exclusive of the interest, determines the "amount in controversy," and we examine them *seriatim*. Hedgecock vs. Davis, 64 N. C., 650, was a suit upon a note of $200 before a justice of the peace, who had jurisdiction of "actions founded on contracts wherein the sum demanded shall not exceed $200," according to the State Constitution. The court held that the *value* of the note was not the criterion, but the sum mentioned in the contract: interest being a mere legal incident, and was no part of the note. (We conclude that the note did not in terms bear interest, but was only a promise to pay the principal.)

A statute of North Carolina also expressly excluded interest upon contracts in determining the jurisdiction, and authorized the remission of any sum over $200 so as to save the jurisdiction. This legislative action is sustained by that court as a legislative determination of the proper construction of the Constitution.

In Fisher vs. Hall, 1 Ark., 275, it was held that the Circuit Court had not jurisdiction of an action of convenant upon a bond for $100, notwithstanding interest had accrued, the jurisdiction given being confined to case in which "the sum in controversy is over $100." This is put upon the ground that "it is the amount or character of the contract, and not interest, that enters into the controversy." This is, in our view, a more consistent theory than that adopted in the North Carolina case. The case does not show that interest was expressly contracted for by the bond in suit.

In the Texas case, Clark vs. Brown, 48 Texas, 212, the question in issue here is not involved. The Constitution of Texas gave jurisdiction to justices of the peace where the "amount in controversy, *exclusive* of interest," was $200 or less, and the only question was whether more than $200 was due of the principal.

In Jackson vs. Whitfield, 51 Miss., 202, it was held that the principal sum was the guide in determining the jurisdiction of justices courts in a case where interest was not a part of the contract, and attached only as damages by operation of law; and the constitutional provision is cited that "the *principal* of the amount in controversy" shall determine the jurisdiction, and the decision was put upon this ground.

The court in 48 Iowa, 652, held expressly that where the action involved an amount beyond the jurisdiction of a justice of the peace, he was ousted of jurisdiction and could not give judgment for a sum within it.

In Pennsylvania (Peter vs. Schlosser, 81 Pa. St., 439,) a

justice of the peace has jurisdiction "in cases where the sum demanded is not above $100." The court holds that where the items of the plaintiff's claim amounted to $137, and it was reduced by payments to less than $100, the justice of the peace had jurisdiction; but it was not obtained by giving credits for an independent account as an offset. The application of this case to the one at bar is not obvious. The foregoing are all the cases cited by appellants. None of the cases cited by them seem to be in point except the Arkansas decision; and in that it does not appear that the obligation sued upon bore interest, except by operation of law in the nature of damages, which was not embraced in the terms of the bond. In a later action before a justice of the peace in Arkansas, upon a bond for the payment of ninety-five dollars and interest, and at the time suit was brought the amount *due* was over $100, it was held, under an act conferring jurisdiction in cases where the amount claimed did not exceed that sum, that the justice did not have jurisdiction, and a judgment in such case was void and furnished no protection to the party or officer executing it. The court says that the covenant sued on as well as the judgment conclusively show that the amount claimed did exceed $100. (Howell vs Milligan, 13 Ark., 40.) And in Hempstead vs. Collins, 6 Ark., 533, it was held that where the entire account of the plaintiff was $260, and credits were given so that the balance due was about sixty dollars, this balance was "the amount in controversy," thus showing that the amount actually due was deemed by the court the amount in controversy, instead of the amount of the plaintiff's entire account.

In Illinois it was held that an action might be maintained before a justice of the peace upon a note for $100, if no interest was claimed. (2 Illinois, 594; 7 Illinois, 389.) In 45 Penn. St., 235, the same ruling was made, the court holding that the interest might be waived, where interest

would swell the amount to over $100. In South Carolina where a justice gave judgment for an amount exceeding $20, the excess being interest, it was set aside as unconstitutional. (2 Brev., 41; Ib., 399.) In Simpson vs. McMillon, 1 Nott & McCord, 192, the court held that the interest was as much a part of the contract as the principal of a note, whether by express stipulation or by the effect of the contract, and that the demand including interest exceeding the limit of jurisdiction, the justice could not render judgment. The Court for the Correction of Errors in New York, (Fake vs. Eddy, 15 Wend.,) held that where interest was stipulated in a bond, it was as much a part of the obligation and demand as the principal.

After searching all the authorities at hand we find no case in which, where the jurisdiction is limited to a certain "amount in controversy," such amount is determined by the amount of principal of a note or bond in terms bearing interest, unless such determination is founded upon express provisions of a constitution or statute. On the contrary, the general rule is determined to be that the amount actually due and for which judgment is demanded is the proper test in determining the limit of jurisdiction.

In this case the declaration, the evidence and the judgment of the County Court prove that the amount in controversy was over three hundred dollars, and the only conclusion is that the court had no jurisdiction, and its judgment was void.

The decree is affirmed.

HENRY C. MCRAE, ET. AL., APPELLANT, VS. ADALINE MCMINN, APPELLEE.

1. If it is shown that an instrument of writing expresses something different from the real intent of the parties, equity will reform it so as to make it conform to such precise intent. The proof must be clear.

2. An administratrix is entitled as widow, having elected a child's part, to one-half of an estate. The father of her husband is entitled to one-half. Under such circumstances the administratrix, without the order of a court of competent jurisdiction, cannot distribute the estate. An instrument purporting to assign to each their respective interests, having no words of conveyance as between each other, may be effective in equity when assented to by the parties as a contract to convey. It does not vest the legal title in either party.

3. Knowledge on the part of a vendee that another is in possession of land, he (the vendee) believing that she in possession is a tenant, coupled with notice (constructive by its record) of the contents of an instrument relating to the land, but not passing the legal title to his grantor, in which, by a description of the topography of the land, he would be led to inquire as to the claim and interest of the party in possession, is sufficient information to lead the vendee to a knowledge of the nature of the title and claim of the party in possession, and a court of equity will deem him conusant of it.

Appeal from the Circuit Court for Alachua county.

On the third of May, A. D. 1878, Adaline McMinn filed in the office of the Clerk of the Circuit Court for Alachua county her bill of complaint against Hatch Whitfield, John H. Watkins, and Henry C. McRae. She alleges substantially that William H. Whitfield died intestate without issue, leaving her, his widow, and his father, the defendant, Hatch Whitfield, surviving; that she afterwards married William L. McMinn, who has since died; that to the estate of her deceased husband belonged, in addition to other lands, certain lands which her former husband had

acquired by purchase from Daniel Hope and wife, all of said lands being in the county of Hernando and State of Florida; that it was agreed between herself and Hatch Whitfield to divide the property equally between them; that she took out letters of administration upon the estate, fully administered thereon, and was legally discharged therefrom; that Hatch Whitfield was entirely satisfied with her acts as administratrix, and left it to her to make an equal and just distribution of the real and personal property of the estate between her and himself; that she engaged an attorney at law to make out the papers and to see that legal titles were made to the lands, giving the "title deeds" to him for this purpose; that no papers or deeds were made except the "distribution." The land embraced in the deed of Hope and wife to William H. Whitfield is described as the southwest quarter of the northeast quarter, and the southeast quarter of the northwest quarter, and the northeast quarter of the southwest quarter and the nowthwest quarter of the southeast quarter of section thirty-five, township twenty-three, south, range nineteen east, also the southeast quarter of the northeast quarter and the southeast quarter of the southwest quarter of section thirty-five, township twenty-three, south, range nineteen east; and the northeast quarter of the northeast quarter of section thirty-five, township twenty-three, range nineteen, south and east, and also the southwest quarter of the southwest quarter of section thirty-five, township twenty-three, south, range nineteen east, containing three hundred and twenty acres more or less. Exhibit B. which is called a distribution, is as follows: "A distribution of the estate of William H. Whitfield, late of Hernando county in the State of Florida, deceased, by Adaline Whitfield, administratrix of said estate, to Hatch Whitfield and Adaline Whitfield, January 1st, 1864." Here follows a memorandum of the slaves set apart to Hatch Whitfield, which it is

unnecessary to state. Then follows a description of the lands assigned to him, thus:

"Lands. The following described lands of said estate are hereby distributed and set apart to Hatch Whitfield, to-wit: the northwest quarter and the west half of the southwest quarter of section thirty-six, the east half of the northeast quarter, and the east half of the southeast quarter of section thirty-five in township twenty-three, the east half of the northeast quarter and the southwest quarter of section two, the west half of the northwest quarter of section twelve in township twenty-four, the southwest quarter of section twenty-nine, and the southeast quarter of section thirty, in township twenty-three south of range nineteen, containing about forty-five acres of land that has been cleared, fenced and cultivated, at $3.75 per acre—$168.75, and about nine hundred and ninety-five acres uncleared land estimated at $1.75 per acre, $1,243.75, making in all 1040 acres—$1,412.50." What is called the distribution to Adaline Whitfield is as to the land as follows:

"Lands. The following lands of said estate are hereby distributed and set apart to Adaline Whitfield, to-wit: the southwest quarter of the northeast quarter, the west half of the northeast quarter, the west half of the southeast quarter, the southeast quarter of the northwest quarter, the east half of the southwest quarter and the southwest quarter of the southwest quarter of section thirty-five in township twenty-three, the west half of the northeast quarter of section two, and the east half of the southwest quarter of section ten in township twenty-four, south of range nineteen east, containing about ninety acres of land that has been cleared, fenced and cultivated, estimated at $3.75 per acre—$337.50, and the buildings thereon estimated at $500, and about three hundred and fifty acres of uncleared land estimated at $1.25 per acre—$437.50, making in all 440 acres and the building at $1,275.09."

This instrument is signed in duplicate by "Adaline Whitfield, administratrix," and is witnessed by two persons.

This deed of distribution, as it is called, was filed in the office of the Judge of Probate. There is a certificate of the Clerk of the Circuit Court for Hernando county appended to the instrument to the effect that what is filed is a true copy of the original, but it does not appear that the original was at any time recorded. Plaintiff alleges that it is apparent from the division of land as shown by this instrument that the buildings are set apart to her, and that she paid five hundred dollars for them. This she alleges was pen log house with shed rooms. She alleges that there a large price for the dwelling house in which she lived, and in which her husband died; that it was an old double were no other buildings of much consequence on any of the lands, other than the dwelling, and that according to the valuation made of the estate all of them were not worth more than five hundred dollars, and that it was understood and intended that she was to have the land on which all the buildings were situated; that the draftsman who drew the "distribution" did not follow the description of the lands in the deed from Daniel Hope and wife to William H. Whitfield according to what was expected, but adopted a description of his own; that instead of describing the lands set apart to Hatch Whitfield as the northeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of section thirty-five, township twenty-three, south, range nineteen, east, being lands acquired from Daniel Hope and wife, he described the lands as the east half of the northeast quarter and the east half of the southeast quarter of section thirty-five, township twenty-three, south, range nineteen east; that all of this was a mistake and contrary to the intention of the parties, and that by this mistake the southeast quarter of the northeast quarter of

section thirty-five, township twenty-three, south, range nineteen east, the forty acres of land upon which the dwelling house was situated, and which was intended to be set apart for her, and for which she paid $500, was set off to Hatch Whitfield. The plaintiff further alleges that she thought that the land assigned to her covered the land upon which the house was situated until at a recent date a claim has been made for it by other parties; that soon after the "distribution" was signed it was admitted to record in the county where the lands were situated before any of the lands assigned to Hatch Whitfield where alienated; that she is informed and believes that Hatch Whitfield made a gift of these lands to John H. Watkins, who, in collusion, &c., hath pretended to convey these lands to Henry C. McRae, for the purpose of defrauding her out of the dwelling house in which she lives and for which she paid; that the said Henry C. McRae brought an action of ejectment against plaintiff for this land in the sixth circuit which has been transferred to the fifth circuit; that said McRae is not "an innocent purchaser without notice;" that said Watkins and McRae "have colluded together to defraud and harrass her by the said suit in the quiet and peaceable enjoyment of her dwelling house." Plaintiff prays that the mistake in the instrument of distribution be corrected; that the land containing the dwelling and other houses as contemplated by the parties be set apart to her, and that other lands be substituted in lieu of the land thus taken from Hatch Whitfield, and that the necessary deeds to carry out the original understanding be decreed to be made, and for an injunction against the judgment at law and for general relief.

The chancellor granted the injunction.

The defendant, McRae, answered. Plaintiff's attorney states that a decree, *pro confesso*, against Hatch Whitfield and John H. Watkins was taken, but the record discloses

no such decree. The defendant, McRae, admits that there was a distribution of the estate between plaintiff and Hatch Whitfield; that he purchased the land of defendant, Watkins, and that when he made the purchase he was not aware and had no knowledge from any source that there was any lien or demand of any kind by any person, or that any other person except Watkins had any right or title to the lands; that he knew nothing of any payment of five hundred dollars, and that he purchased the land with the understanding between himself and Watkins that the dwelling-house was included in the sale, and that he would not have made the purchase otherwise; that he gave as a consideration for said land nine hundred acres of valuable land in the State of Alabama, and that the exchange was made in perfect good faith. He admits that the instrument of distribution was recorded before the lands were conveyed to him. The defendant alleges that after the execution of the instrument of distribution, and from March, A. D. 1864, until October, A. D. 1872, the said Hatch Whitfield owned and possessed the land, and that at this latter date it was conveyed to the defendant, Watkins, who, in February, A. D. 1875, conveyed it to this defendant; that in 1868 or 1869 plaintiff intermarried with William McMinn; that said Hatch Whitfield, being an old man in good circumstances living in the State of Mississippi, from feelings of kindness, allowed his daughter-in-law to use and enjoy said lands, she agreeing to pay the taxes thereon; which she did up to the year 1871, when, although the lands were returned, they were sold for taxes on the 22nd day of April, 1872, and he, McMinn, bought them in in his own name; that Hatch Whitfield, hearing of this attempt to defraud him of his lands, conveyed them to his grandson, Watkins, who, on the 27th November, A. D. 1872, redeemed; that defendant, Watkins, came to Florida, and, after examining the lands and the houses, determined to remove to Florida;

that with this determination he left the lands in charge of McMinn and returned to Mississippi for his family; that soon thereafter McMinn died leaving plaintiff in possession of the lands; that Watkins started to remove to Florida and his wife died; that he decided to remain in Mississippi and to sell the Florida lands; that this defendant, McRae, opened a correspondence with Watkins, the result of which was an exchange of lands as aforesaid; that Watkins at once took possession of the Alabama lands; that this defendant has never seen the said Watkins; that all the negotiations were by letter and through attorneys; and that no information was ever conveyed to him by any means of any claim to the land by any person other than the said Watkins, and he avers that the consideration paid for these lands was valuable, adequate and made in entire good faith; that after receiving his deed from Watkins, and after his removal to Florida with his family, he attempted to take possession of the lands and the dwelling and other houses thereon, when he was refused possession under a claim of title by plaintiff; that upon a survey being made it was ascertained that the houses were on his land, but that plaintiff refused, and still refuses, to deliver the land, and for this reason he has brought his action of ejectment. Defendant avers that he is informed and believes that plaintiff never claimed these lands until he began said action, and that she knows that she is not the owner thereof; that this detention of the lands has occasioned him great loss—the profits of the orange grove and nine crops being worth from $600 to $800 per annum. Denying all fraud and collusion charged, he prays that the bill may be dismissed.

After replication, testimony and hearing, the court decreed that the alleged mistake existed; that the real pupose of the parties was to distribute the land containing the houses to Adaline McMinn, declared it to be her property and found that McRae took the deed from Watkins

with such notice that he was subject to all the equities and rights to which Watkins and Hatch Whitfield were liable, and granted a perpetual injunction to the suit at law.

From this decree this appeal is taken.

The ground of appeal is simply that the decree should have been for defendant, and not for the plaintiff.

Thomas F. King for Appellants.

James T. Magbee for Appellee.

MR. JUSTICE WESTCOTT delivered the opinion of the court.

We do not propose to enter into any elaborate discussion of the facts and will do little more than state conclusions in this case.

Our first conclusion is that the mistake as to southeast quarter of the northeast quarter of section thirty-five, township twenty-three, south, range nineteen east, is established.

Upon the face of the deed of "distribution" as it is called, and without reference to any parol testimony except to locate the houses, it is apparent that there was a mutual mistake arising from misdescription of the lands in this instrument. Hatch Whitfield intended that Mrs. McMinn should have the forty acres upon which the houses were situated, and she was to receive this land according to the understanding. In the instrument of distribution, (as it is called,) it is distinctly stated that she was charged five hundred dollars for the improvements, and it is shown beyond doubt by the evidence that the southeast quarter of the northeast quarter contained the forty acres upon which was located the dwelling house and principal improvements. In addition to this, it appears from the testimony that the improvements were on the south half of the northeast quarter, and as according to the "distribution" she was to re-

ceive ninety acres of cleared land, and there were only one hundred and thirty-five acres of cleared land in the whole tract, forty-five of which were given to Whitfield, it must have been understood that she was to have the eighty embraced in the south half of the northeast quarter, otherwise she could not have got the ninety acres of cleared land. In this instrument the parties, so far as the southeast quarter of the northeast quarter was assigned to Whitfield, expressed something different from the actual intent of the parties, that intent being shown for the most part on the face of the paper, parol testimony being admitted simply to show the actual condition of the lands. In all such cases if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract so as to make it conform to the precise intent of the parties. 13 How., 66; 8 Ala., 345; Story Eq., §152. Lord Hardwicke remarks in Henkle vs. Royal Assurance Company, 1 Ves. Sr., 317: "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that if reduced into writing contrary to the intent of the parties on proper proof that would be rectified."

It is insisted, however, that McRae is a *bona fide* purchaser from Watkins without notice of any equity of Mrs. McMinn. In the first place it is to be noticed that Whitfield, Watkins' grantor, as against Mrs. McMinn, had simply an equitable title.

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No conveyances were passed between the parties.

estate, and the instrument itself did not propose in terms to pass any legal title from the one to the other. True it is that a court of equity might perhaps have treated it as an agreement between the parties, and directed at the suit of one or the other an interchange of deeds, but the legal title, so far as this instrument is concerned, was not affected

by it. In the next place it is to be noted that Watkins, McRae's grantor, was not a purchaser for valuable consideration from Hatch Whitfield. This deed was in consideration of love and affection. In the next place it is admitted by McRae that at the time he purchased of Watkins, he knew that Mrs. McMinn "was in possession of the property, but thought she was there as a tenant." This was sufficient information, together with the fact of the recording of the instrument of distribution of which he had constructive notice, to require him to enquire as to the nature of her possession.

Being held to a knowledge of the instrument of distribution, he must be held to a knowledge not alone of the descritpion of the land in the numbers of sections therein contained, but to a knowledge of its character and topogaphy therein stated. That instrument states distinctly that the grantor of his grantor was to have about forty-five acres of cleared land and about nine hundred and ninety-five acres of uncleared, and that plaintiff was to have about ninety-five acres of cleared land and *the buildings thereon, estimated at five hundred dollars.* This knowledge of possession as tenant, and this constructive notice as to who was the owner of the buildings, was sufficient to put this purchaser upon enquiry, and, having sufficient information to lead him to a knowledge of the nature of Mrs. McMinn's claim and title, a court of equity will deem him conusant of it. Notice that an estate is in possession of a tenant is held to be notice of a lease, although the purchaser took it for granted that the tenant was only so from year to year. (2 Ves., 440; 13 Ves., 121.) So if the tenant has even changed his character by having agreed to purchase the estate, yet his possession amounts to notice of his equitable title as purchaser; (16 Ves., 249; 2 Sch. and Lefroy, 583;

2 Swanst., 181; 2 Ball & Beatt., 416;) and, consequently, a subsequent purchaser, although without actual notice, will

be considered as a purchaser of the seller's title subject to the equity of the tenant. The authorities go beyond the case at bar. We think the general rule is, that where a person, other than the grantor, is in possession, it is the purchaser's duty to enquire into the title; and the presumption of law is that upon such enquiry he ascertains the true state of the tltle. Here, in fact, the interest of each party was at most an equitable title. Under the distribution the parties had a right to compel an interchange of deeds, subject to existing equities arising from the mistakes stated. (6 Greenleaf, 258; 32 Maine, 143; 22 Maine, 312; 3 Mass., 573; 4 Mass., 638; 2 Mass., 508; 6 Mass., 489; 10 Mass., 60; 3 Pick., 152; 3 Met., 405.)

The decree in this case, as it appears from the transcript of the record, declares "the northeast quarter of section thirty-five, (S. E.¼ of N. E.¼, S. 35, T. 23, R. 19 S. and E.,) twenty-three, range south and east," "to be the land of complainant," and perpetually enjoins the defendant from proceedings at law to recover it, or making any claim to it. This is evidently another mistake; either of the judge in making the decree, or of the clerk in copying it in the transcript of the record. It is a serious error somewhere—one to be regretted. That which is written out at length here should control. What is written in parenthesis we must presume wes intended, as is usual in such cases, to state in figures what is stated at length and is written out. This being true, the decree here strictly construed declares "the northeast quarter of the northeast quarter of section thirty-five" to be the land of complainant. This, as a matter of course, is all wrong. It is thus evident that we cannot affirm the decree disclosed by this record. But there are other objections to the decree. The plaintiff does not even pray an absolute decree of this character against McRae. She admits that he is entitled to some other forty

acres in lieu of this claimed by her, and asks that other lands be assigned him.

If the defendant so desires it, he should be given another forty acres of the land assigned Adaline McMinn. He is not, however, entitled to land equal in value to five hnudred dollars. He should be given forty acres of the same general character as that embraced in the nine hundred and ninety-five acres assigned to Hatch Whitfield in what is called the distribution.

Should the defendant so desire, the court will refer the question of the allotment of forty acres to him to commissioners, who will be directed to assign to him forty acres of land in such place and at such point and of such quality as above described, as is most equitable and just to each of the parties. If the defendant can establish the precise forty to which he was entitled, and which it was intended he should have, as a matter of course that should be assigned him. The court, after an allotment made, should decree that the title to the several parcels or portions of the land allotted to each shall vest in the respective parties as against the other parties to the suit, or those claiming through or under them. The chancellor should also direct that a copy of the decree thus rendered be recorded by plaintiff in the office of the Clerk of the Circuit Court in which the lands lie. The expense of a commission may be saved if the parties will consent to an assignment of forty acres to defendant in lieu of the forty acres as to which there was a mistake, the court, upon such consent, making the decree stated. The decree will continue the injunction.

The decree is reversed, and the case is remanded for further proceedings conformable to law and consistent with this opinion.

WILLIAM SHERMAN, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. In a criminal prosecution, not capital, it is not required of the judge to deliver his charge, or to give his rulings upon instructions asked for by counsel, to the jury in writing, unless the *request* so to charge is made by counsel or parties in writing, before the close of the testimony. Construing Chapter 2096, laws of 1877.

2. It is not error if the judge refuse to give instructions asked for, however pertinent, if the same in substance and effect has already been given by him to the jury.

3. It is not necessary for the judge to read to the jury the instructions asked for by counsel when he refuses to charge as requested. It is only required in such case that he give his ruling thereon as "refused," without informing the jury what is contained in the instruction prayed for.

4. The statute of 1832, (Thomp. Dig., 490,) providing a punishment of the offense of "assault with intent to kill," is repealed by, and the offense is embraced in sections 1, 34 and 46 of sub-chapter III. of chapter 1637, laws of 1868, by which an assault with intent to murder, or with intent to commit manslaughter, is made a felony.

5. An indictment charging that S. committed an assault with intent feloniously, wilfully, maliciously, and of his malice aforethought to kill and murder, is an accusation of intent to murder.

6. A new trial will not be granted on the alleged ground that the verdict is contrary to law and the evidence, there being evidence to support the verdict, however conflicting the testimony of witnesses of the respective parties, unless it seems that great injustice will result, or that the jury acted under improper influences.

7. An application to set aside a verdict and grant a new trial on the ground of newly-discovered testimony must be accompanied with some evidence that such testimony actually exists.

Writ of Error to the Circuit Court for Leon county.

The facts of the case are stated in the opinion of the court.

William I. Vason for Plaintiff in Error.

by it. In the next place it is to be noted that Watkins, McRae's grantor, was not a purchaser for valuable consideration from Hatch Whitfield. This deed was in consideration of love and affection. In the next place it is admitted by McRae that at the time he purchased of Watkins, he knew that Mrs. McMinn "was in possession of the property, but thought she was there as a tenant." This was sufficient information, together with the fact of the recording of the instrument of distribution of which he had constructive notice, to require him to enquire as to the nature of her possession.

Being held to a knowledge of the instrument of distribution, he must be held to a knowledge not alone of the descritpion of the land in the numbers of sections therein contained, but to a knowledge of its character and topogaphy therein stated. That instrument states distinctly that the grantor of his grantor was to have about forty-five acres of cleared land and about nine hundred and ninety-five acres of uncleared, and that plaintiff was to have about ninety-five acres of cleared land and *the buildings thereon, estimated at five hundred dollars.* This knowledge of possession as tenant, and this constructive notice as to who was the owner of the buildings, was sufficient to put this purchaser upon enquiry, and, having sufficient information to lead him to a knowledge of the nature of Mrs. McMinn's claim and title, a court of equity will deem him conusant of it. Notice that an estate is in possession of a tenant is held to be notice of a lease, although the purchaser took it for granted that the tenant was only so from year to year. (2 Ves., 440; 13 Ves., 121.) So if the tenant has even changed his character by having agreed to purchase the estate, yet his possession amounts to notice of his equitable title as purchaser; (16 Ves., 249; 2 Sch. and Lefroy, 583;

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nent, had been previously given, * * and the said judge refusing in writing to give in charge to the jury the said written instructions on points of law, as requested by counsel for defendant, for the reasons aforesaid; and then and there failed to read written instructions to the jury, and to inform the said jury in writing what the said written instructions, as presented by counsel for defendant, were, as requested by counsel for defendant; and the said judge then and there stated in writing to the jury that he refused to give the instructions upon the points of law presented by counsel for the defendant without stating what such instructions, so asked for, were." To all which action and refusal the defendant excepted.

There was no "request in writing, before the evidence in the case was closed," that the judge should "charge the jury in writing." Instructions by the judge to the jury, whether given of his own motion without request or upon written instructions presented to him by counsel, constitute the "charge" of the court. The second section of chapter 2096, laws of 1877, is a proviso to the first section, and by its provisions the judge is not required to give his charge or instructions in *writing* to the jury, unless a request in writing be made by parties or attorneys before the close of the evidence, in criminal cases not capital. The object of the statute in requiring the party to make his request in writing before the close of the evidence is that the judge may have sufficient time to consider and to write out his instructions to the jury. 10 Ind., 143; 12 Id., 529.

In this case the record does not disclose that either party requested of the judge in writing, before the close of the testimony, that the charge should be in writing. If that had appeared, it would have presented a case that is not now here. It does appear, however, that the judge stated in writing to the jury he "refused to give the instructions asked for," and that the reason for such refusal was

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acres in lieu of this claimed by her, and asks that other lands be assigned him.

If the defendant so desires it, he should be given another forty acres of the land assigned Adaline McMinn. He is not, however, entitled to land equal in value to five hnudred dollars. He should be given forty acres of the same general character as that embraced in the nine hundred and ninety-five acres assigned to Hatch Whitfield in what is called the distribution.

Should the defendant so desire, the court will refer the question of the allotment of forty acres to him to commissioners, who will be directed to assign to him forty acres of land in such place and at such point and of such quality as above described, as is most equitable and just to each of the parties. If the defendant can establish the precise forty to which he was entitled, and which it was intended he should have, as a matter of course that should be assigned him. The court, after an allotment made, should decree that the title to the several parcels or portions of the land allotted to each shall vest in the respective parties as against the other parties to the suit, or those claiming through or under them. The chancellor should also direct that a copy of the decree thus rendered be recorded by plaintiff in the office of the Clerk of the Circuit Court in which the lands lie. The expense of a commission may be saved if the parties will consent to an assignment of forty acres to defendant in lieu of the forty acres as to which there was a mistake, the court, upon such consent, making the decree stated. The decree will continue the injunction.

The decree is reversed, and the case is remanded for further proceedings conformable to law and consistent with this opinion.

be considered as a purchaser of the seller's title subject to the equity of the tenant. The authorities go beyond the case at bar. We think the general rule is, that where a person, other than the grantor, is in possession, it is the purchaser's duty to enquire into the title; and the presumption of law is that upon such enquiry he ascertains the true state of the title. Here, in fact, the interest of each party was at most an equitable title. Under the distribution the parties had a right to compel an interchange of deeds, subject to existing equities arising from the mistakes stated. (6 Greenleaf, 258; 32 Maine, 143; 22 Maine, 312; 3 Mass., 573; 4 Mass., 638; 2 Mass., 508; 6 Mass., 489; 10 Mass., 60; 3 Pick., 152; 3 Met., 405.)

The decree in this case, as it appears from the transcript of the record, declares "the northeast quarter of section thirty-five, (S. E.¼ of N. E.¼, S. 35, T. 23, R. 19 S. and E.,) twenty-three, range south and east," "to be the land of complainant," and perpetually enjoins the defendant from proceedings at law to recover it, or making any claim to it. This is evidently another mistake; either of the judge in making the decree, or of the clerk in copying it in the transcript of the record. It is a serious error somewhere—one to be regretted. That which is written out at length here should control. What is written in parenthesis we must presume wes intended, as is usual in such cases, to state in figures what is stated at length and is written out. This being true, the decree here strictly construed declares "the northeast quarter of the northeast quarter of section thirty-five" to be the land of complainant. This, as a matter of course, is all wrong. It is thus evident that we cannot affirm the decree disclosed by this record. But there are other objections to the decree. The plaintiff does not even pray an absolute decree of this character against McRae. She admits that he is entitled to some other forty

GOTTSCHALK POTSDAMER, PLAINTIFF IN ERROR, VS. THE STATE OF FLORIDA, DEFENDANT IN ERROR.

1. Objections to the manner of summoning, empaneling, and the qualifications of grand jurors must be taken by plea in abatement, or motion to quash, before pleading to the indictment.

2. The record reciting that the grand jurors were called, empaneled and sworn, without giving the words of the oath, it will be presumed that the proper oath was administered.

3. When the record shows that the members of the grand jury were duly sworn as such, and the caption of the indictment states that the jurors were "duly chosen, empaneled and sworn diligently to inquire, and true presentment make, in and for the body of the county," etc., "do present," etc., this is a sufficient statement that the presentment is "upon their oath."

4. The incompetency of petit jurors must affirmatively appear, otherwise a verdict will not be disturbed. The record showing that the jury was duly selected, empaneled and sworn, it is presumed they were "good and lawful men," until the contrary is shown.

5. When in a capital case the record shows that the jury was "called, empaneled and sworn," it must be presumed that the requisite oath was administered unless the contrary be made to appear in the record.

6. A sentence to the "State Penitentiary or State Prison" in this State is not ambiguous or in the alternative, there being but one institution for the confinement of convicts, and the statute uses both forms of words to indicate the same place of confinement.

7. The statute of 1877, chapter 2096, requires charges by the court to the jury, and the ruling of the judge upon instructions proposed by counsel to be in writing and signed and sealed by the judge, and filed immediately after delivered, when they form a part of the record. In order to assign error thereon in the appellate court, either as to the substance of the charge or the ruling of the judge or the omission of the judge to sign and seal the same, exceptions must appear by the record to have been duly taken by a party or counsel to any error or omission or refusal of the judge.

8. A bill of exceptions appearing to have been signed by the judge after the expiration of the term, without an order having been made extending the time for preparing the same, is a nullity.

be considered as a purchaser of the seller's title subject to the equity of the tenant. The authorities go beyond the case at bar. We think the general rule is, that where a person, other than the grantor, is in possession, it is the purchaser's duty to enquire into the title; and the presumption of law is that upon such enquiry he ascertains the true state of the title. Here, in fact, the interest of each party was at most an equitable title. Under the distribution the parties had a right to compel an interchange of deeds, subject to existing equities arising from the mistakes stated. (6 Greenleaf, 258; 32 Maine, 143; 22 Maine, 312; 3 Mass., 573; 4 Mass., 638; 2 Mass., 508; 6 Mass., 489; 10 Mass., 60; 3 Pick., 152; 3 Met., 405.)

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ticular time anterior to the killing, its existence is presumed to have continued down to the time of the homicide."

The other facts of the case are stated in the opinion of the court.

W. M. Ives, John T. Walker and *John E. Hartridge* for Plaintiff in Error.

The Attorney-General for the Defendant in Error.

THE CHIEF JUSTICE delivered the opinion of the court.

Plaintiff in error was indicted in Columbia county for murder in the first degree, and upon trial was convicted by the verdict of the jury of murder in the second degree, and sentenced to imprisonment for life "in the State Penitentiary or State Prison."

A motion for a new trial was made and denied, but the grounds of the motion are not stated in the record.

As to the errors assigned: The first, third and fourth relate to the summoning, qualifications and organization of the grand jury. The rule is that such objections must be taken by motion or plea in abatement before pleading to the indictment. It is not proper ground of a motion for a new trial. Gladden vs. The State, 13 Fla., 623; Burroughs vs. State, 17 Fla.

The *second* error assigned is that the record does not show that the grand jury was duly sworn, or what oath was administered.

The record shows that the grand jurors were "empaneled and sworn in the following order." (giving their names) and were charged by the court. Two others not then present, afterwards appeared, and each "was sworn as a grand juror," and went to the jury room. On the next day "the grand jury came into court and presented the following indictment." Then follows the indictment, the cap-

tion of which states that the grand jurors, "duly chosen, empanelled and sworn, diligently to inquire and true presentment make in and for the body of the county of Columbia upon their—— do present," &c.

1 Bishop Crim. Pro., §1171, says: "As to the swearing of the grand jury, the indictment must appear in the record to have been found upon oath. And if the record undertakes to set out the oath, and sets out one which is insufficient in form, it will be ill. But it need not give the form, and if it states that the jurors were duly sworn, not mentioning by what form of words, this will be sufficient." This is supported by an abundance of authorities cited by Mr. Bishop.

In one of the briefs it is said that the caption of the indictment does not recite that the grand jury "on their *oath* present." The one of this form of words is not essential if it appears that the grand jury was duly sworn. It is said, 1 Chitty's Crim. Law, 334, that if the caption proceed without saying "upon their oath," the caption will be invalid. The use of these words, however, is intended to indicate that they had been sworn as grand jurors before making the presentment. But not only does the record show that the grand jury was empanelled and sworn, but the caption itself says they were "duly sworn," and in the body of the indictment they say, "and so the jurors aforesaid upon their oath aforesaid, do say," &c. This would seem to be abundantly explicit. The question, however, can hardly arise upon a motion to set aside the verdict and grant a new trial.

The fifth, sixth and seventh assignments of error are, that the record does not show that the petit jurors were "good and lawful men," or that they were duly empanelled and sworn, or that the oath required by law in capital cases was administered.

The record does not show that any question was raised

on empanelling the jury as to their qualifications. In 1 Bish. Crim. Pro., §1182, is said upon authority that if the record shows that the jury were duly selected, empanelled and sworn, the law will infer that they were good and lawful men.

No objection having been made at the trial, it is too late to object here, as there is no opportunity in the appellate court to correct an error which might have been avoided by ascertaining the qualifications of the jurors when they were called at the trial. Bishop Crim. Pro., §666.

The incompetency must appear or the verdict will not be disturbed. 12 Fla., 151.

As to the oath, counsel for defendant cities 47 Ala., 30, 31, to show that the oath as prescribed by law in capital cases must appear to have been administered. In that case the record showed that an oath different from that prescribed by law was administered, and the court held that it thus appeared that the statutory oath was not taken. The court remarks, however, that "if it were stated that the jury were only sworn according to law, it might be presumed that they were sworn in the form required by the staute."

In 2 G. Green's Rep., (Iowa,) 285, the court say in a capital case: "Had their oath contained the substance of this (the statutory form) in any other form, we should, after verdict, have regarded it as sufficient. Or had the record remained silent upon this point, we should have presumed that they had taken the legal oath." See also 6 Eng., (Ark.,) 465. The record here shows that the jury was "called, empanelled and sworn." Nothing being said about the form of the oath, but simply that the jury was sworn, it must be presumed, no question being raised in the court below, that they were properly sworn. The record does not show that any error was committed in this respect.

The *eighth* error assigned is that the sentence is not warranted by law.

The sentence was imprisonment in the "State Penitentiary or State Prison." The statute in 1868 organized a "State Penitentiary" for the confinment of convicts. In 1871, (chap. 1835,) and in 1877, (chap. 3033,) the legislature organized the "State Prison," and provided (sec. 1, chap. 3033) that "the word Penitentiary, whenever the same is used in any of the acts of this State as a place of punishment for crime, shall be construed to mean and refer to the State Prison." There is but one State institution of this character in this State, and there can be no difficulty in determining what is meant by the words of this sentence by the court. The State Penitentiary is the State Prison. The first section of the last act calls it a "State Prison." The 22nd section says "all prisoners shall be delivered to the Adjutant General at the Penitentiary," &c. The words are used to indicate the same prison or place of confinement. It cannot be said that the sentence is in the alternative.

The errors assigned numbered 10 to 17 inclusive relate to the charge and the instructions asked for by the counsel for defendant.

The act of 1877, chap. 2096, requires of the judge in capital cases, if he charge the jury, to do so in writing, upon the law of the case, and if the parties or their attorneys present to him instructions in writing upon points of law or exceptions taken, arising on the trial, it shall be the duty of the judge to declare in writing to the jury his ruling thereupon as presented, and pronounce the same to the jury as given or refused. These charges, and instructions, and rulings, shall be signed and sealed by the judge and by him filed, and form a part of the record in the case, immediately after delivered.

There are among the papers constituting this record what purports to be charge by the judge, and also what purports to be instructions asked for, and upon the most of them the judge has written "given" or "refused," and

signed his name thereto, but without sealing the same. They are certified to by the clerk as though a part of the record.

The statute is a positive requirement of a duty by the judge, as was remarked in the case of Baker vs. The State at the last term. (17 Fla.) It is also there remarked that these omissions are fatal errors, but it was not intended to say that advantage could be taken of them without presenting them to this court by exceptions duly taken and authenticated. It is also a fatal error if the judge rule wrong upon a material point to the injury of a party in respect to testimony, its admission, relevancy and effect; but advantage can only be taken of the error by an exception seasonably taken and brought here according to the law and practice of the courts.

The paper called a bill of exceptions here presented is a nullity, because it was not prepared and signed in proper time, either during the term or within a time fixed by order of the court. These charges and instructions and the rulings of the judge are not signed and sealed by the judge, and there appears no exception to the omission. As they are not sealed they are not "a part of the record in the case," and we cannot, therefore, consider them for any purpose except in the instances hereafter noticed. The neglect of the judge may have been error, but without excepting in due time to his action, or omission to act so that, as in other cases, the judge may have opportunity to correct it, the parties waive any benefit otherwise arising from the error. This is a well-settled and familiar rule of law which we are not at liberty to violate in any instance. The questions here considered, arising under the act of 1877, are discussed, in the opinion of the court, in the case of the Southern Express Company vs. Van Meter, (17 Fla.,) decided at the present term, and the rule, as there announced, in respect

to the omission to sign and seal the charge and instructions, is adopted and intended to be applied here.

The eighth section of chapter 138, laws of 1848, is repealed by the act of 1877. That section declared it to be error for which a writ of error might be prayed, as right, if the judge omitted to charge a jury in writing and to file his charge in the case. The absence from the record of a charge signed by the judge, (a charge having been made,) was, under that section, evidence of error, for which a judgment might be reversed. The omission of such a provision from the act of 1877 shows that the Legislature did not intend that the rule should apply under the latter act, but that the ordinary rule of law in respect to errors and exceptions should apply to all cases. Parties are precluded by the absence of exceptions to the omission from proposing such execptions upon a writ or error here. Upon examining them of our own motion we do not discover that the instructions given could have operated to the prejudice of the defendant at the trial.

It is evident, by a memorandum signed by the judge, that the defendant excepted to the refusal of the judge to give an instruction tendered in respect to the right of self-defense and repelling force by force: but we find that the judge did give the substance of the instruction in the same paragraph.

Another exception was taken to an instruction in respect to previous malice proved, and the presumption that the final act might be referred to it in ascertaining the motive; and the influence of evidence that the killing was upon a sudden provocation to destroy the legal presumption of continuing malice. We do not think that the judge erred in giving the instruction as it appears in the record. The material substance of it is in accord with approved authorities.

The *eighteenth* error is that the defendant was arraigned

and pleaded to the indictment after the jury was sworn. There is an entry in the record showing an arraignment and a plea of not guilty before the jury was empanelled.

The *nineteenth* and *twentieth* errors alleged are that the judge over-ruled a motion for a new trial, and that a verdict of murder in the second degree was not warranted by the evidence.

The grounds of the motion for a new trial are not stated in the record, and we cannot, therefore, say that there was error in denying it upon the ground upon which it was moved.

Whether the evidence was sufficient to warrant a verdict of murder in the second degree we cannot determine, as the evidence is not properly before us. One of the counsel for plaintiff in error urges that a verdict of murder in the second degree cannot be supported under an indictment for murder in the first degree. Murder in the first degree, properly charged, includes every grade of homicide. The degree of the offense, or whether the homicide is justifiable or excusable, depends upon the evidence, and is to be determined by the jury.

Mr. Phillips says "it is an universal principle which runs through the whole of the criminal law that it will be sufficient to prove so much of the indictment as charges the defendant with a substantive crime." 1 Ph. Ev., 202, 7 London ed., and see People vs. White, 22 Wend., 167, 176; People vs. Enoch, 13 Wend., 159; 9 Cal., 576; 1 Ga., 222; 6 Miss., 730; 5 Mo., 497; 6 Id., 231; 30 Id., 13; 1 Parker, Cr. R., 182; 3 Humph., 25.

It is said that there is no statute of this State authorizing a verdict of murder in the second degree when the indictment charges a murder in the first degree.

The staute of New York, at the time of the decisions just cited, was identical with our law defining the different degrees of murder. But we have a statute which expressly

authorizes such a verdict. It provides that "whenever any person indicted for a felony shall, on trial, be acquitted by verdict of part of the offense charged and convicted of the residue thereof, such verdict may be received and recorded by the court, and thereupon the person charged shall be adjudged guilty of the offense, if any, which shall appear to the court to be substantially charged by the residue of such indictment, and shall be sentenced and punished accordingly." Section 7, sub-chapter XIII., chapter 1637, laws 1868.

This indictment charges a murder with malice, &c., and with a premeditated design to effect the death, &c., being murder in the first degree. Murder in the second degree is a killing by an act imminently dangerous to others, &c., *without* a premeditated design to effect the death of any particular individual. Thus, of necessity, the degree of homicide is to be determined by the evidence in the particular case. If, by the evidence, there is nothing to satisfy the jury that there was a premeditated design to effect death, and they are convinced, and find that the accused committed the homicide under circumstances and with the *animus* mentioned in the statutory description of murder in the second degree, the effect is to acquit of the higher grade of the offense, and of all the elements charged in the indictment indicating the higher grade of homicide.

The judgment must be affirmed.

The plaintiff in error then filed a petition for re-hearing, which is as follows:

To the Honorable, the Chief Justices and the Associate Justices of the Supreme Court:

Your petitioner, Gottschalk Potsdamer, the above-named plaintiff in error, by John T. Walker of counsel, humbly

petitions the court to grant to him a re-hearing upon the fololwing assignments of error heretofore made by him:

1. The assignments numbered from 9 to 11, both inclusive, and the assignments numbered 14, 16 and 17, all being upon the ground of the omission of the presiding judge in the court below to observe, in various particulars, the requirements of chapter 2096, of the laws of Florida.

And your petitioner, by his counsel, respectfully submits that, owing to the circumstance of the cause not having been argued orally by the Attorney-General at the time it was submitted, and to the further circumstance that the Attorney-General afterward submitted an able and elaborate argument in writing, which was not seen by your petitioner's counsel until after the opinion of the court had been pronounced, and so was not replied to; the various questions arising upon the above-mentioned assignments have not been fully discussed on both sides. Wherefore, your petitioner craves leave to observe that it was assumed by his counsel at the hearing that what purports, in the transcript on file, to be charges given by the court, and charges prayed for by counsel, were such indeed, and were part of the record in the lower court. They are so treated by the learned Attorney-General in his written argument for all purposes; but, in the opinion of the court, page 7 of the manuscript, that they are not parts of the record because they are not sealed.

Your petitioner begs that your Honors will notice that the transcript of the record, does affirmatively and sufficiently show that charges were given by the judge, on the authority of Long vs. State, 11 Fla., 299; and see 9 Fla., 517; Guggan vs. State, 8 Fla., 19; Id., 33; 16 Ohio St. 348.

But if any charges were given they must, this being a case of felony, punished capitally, under chapter 2096, have been wholly in writing, and have been filed in the case and have thus become a part of the record. If they were de-

livered to the jury from the bench, they were, it is respectfully submitted, charges, and they must have guided the jury to their verdict. The failure to sign and seal them, or to endorse the ruling thereupon, lessened not their effect upon the jury. The jury thus having them, and being influenced by them, it is the right of your petitioner to have them reviewed by this honorable court; and the statute has prescribed the mode of authenticating them, that is, by making it *one of the duties* of the judge to file them in the case. Surely his failure to perform the other duties of signing and sealing could not cure the more serious error of failing to perpetuate them by making them, in the mode prescribed, parts of the record. The omission to seal or to sign is, we contend, simply a violation of that one of his duties which needs not to be performed *until after the jury has received the charge from the bench,* and its effect for weal or woe to the defendant has been expended upon the *auditors* in the jury box—a duty over which the defendant could exercise no control, and the omission of which he might not be apprised of (as was the fact in this case) until after the charge would be filed and had become a part of the record, when it would be too late, as well as useless, to take any exception.

Exceptions, according to all the authorities, must be taken at the time the thing sought to be excepted transpired, and always before the retiring of the jury; but the jury always retire as soon as the instructions are received, when, also, under the statute, they must be immediately filed.

In the case of the Southern Express Company vs. Van-Meter, at the present term, it was distinctly held that the charges may be filed and become part of the record though not signed and sealed.

If, however, though filed in fact and hence certified as part of the record, and bearing all the other evidence, such as signing by the judge and having his ruling endorsed on

some of them, they cannot be treated as part of the record; then, as enough does appear to show that charges were in fact given, there appears by the record the violation of every duty—the reducing of the charges to writing, the signing, the sealing, the failure to endorse, and the failure to file.

But it is said these several matters cannot be availed of for the first time in the appellate court; they should have been excepted to in the court below, and brought to this court by bill of exceptions. We again reply that we could not know that what the law required the judge—not the defendant to make part of the record—was omitted by him until we had inspected the record, and then it would be too late.

We further respectfully and confidently urge (1) that there is no such thing in felonies—certainly not in a case involving life—as a waiver, by the silence of the defendant, of valuable rights secured to him; not by a mere rule of court devised for convenience in the administration of justice and so largely under the control of the court, the creator, but by the law of the land; (2) that it is not the function of exceptions to warn the court against error or to guard the judge against a failure to do duty, and that "the sole office of a bill" of exceptions is to make matters which are extrinsic or "or out of the record a part of the record," (21 Ill., 45); in which case it is further observed that "it should be well understood that a bill of exceptions is not necessary in any case where the error is intrinsic, appearing on the face of the record." So, it is only because, generally, charges of the court cannot otherwise be got into the record, exceptions are necessary to bring them before the reveiwing tribunal. Insurance Company vs. Lanier, 5 Otto, 171, and see 1 Fla., 64 and 81; 5 Fla., 466, 470.

But in Florida, as was said in Dixon vs. State, 13 Fla., 651, "the charge of the court is *by law* a part of the rec-

ord," and that "these provisions of the law are plain and positive, a disregard or non-observance of these requirements, particularly in a case of felony, is material error."

After a somewhat diligent search we have found but one State having a statute similar to ours, Pennsylvania, and it is there held under a statute that requires the judge who delivers the charge, if either party, by himself or counsel, requests him to do so, to reduce his charge "to writing and *file the same of record in the cause;*" and in construing other statutes similar to ours that the only reason of introducing the bill of exceptions was that the opinion excepted to could not otherwise appear upon the record, "and that it is only because the charges thus become *a part of the record* that error can be assigned upon them; but that as the statute makes the charges a part of the record exceptions are no longer necessary, though they may be resorted to; so that, if in either of these modes the matter to be reviewed is brought upon the record, the writ of error, which goes to the whole record, brings it, necessarily, into the court, and counsel *may come here and assign errors upon any part of the record, and it is our duty to notice them.*"

Wheeler vs. Winn, 53 Penn. St., 126, 129, in which the objection was distinctly made to the assignment upon the charges that in the court below "no exception in form was rendered or noted." This is a very full and instructive case upon the whole subject of bills of exception and writs of error, and has uniformly been followed in Pennsylvania.

Your petitoner humbly asks leave of your Honors to quote as follows from another opinion of the same learned court in Frankstown Township Road, 26 Penn., St. 472, an appeal from an order confirming *a report of* road reviewers, *the record* showing certain *irregularities* in the proceedings. After pointing out the irregularities, the opinion proceeds: "What is urged in favor of it, (the order,) simply that the plaintiff in error did not complain in the court below. * *

When it is said that all irregularities and errors to which exception is not taken in the quarter session will be considered as waived, the court must be considered as excepting such as appear on the face of the record. We are a court of review, to hear and determine all and all manner of plaints, pleas and causes which shall be brought or removed from any other court of this commonwealth; to examine and correct all and all manner of error of the justice, magistrate and courts of the commonwealth in their process, proceedings, judgments and decrees; and when a citizen, by appropriate process, brings before us a record of an inferior court, and points out a clear error therein, it is difficult to imagine any excuse that will justify us in refusing to correct it. If we say he should have complained in the court below, he may answer as their plaintiff in error did (and as we do in the case under consideration), that he had no notice of the proceedings until too late. But if he answer not at all, or if he say he chose to rely on his writ of error, which is a writ of right, I see not how he is to be denied the justice he demands."

"Whatever proceedings or facts the law or practice of the court *requires to be placed of record* or enrolled, constitute and form part of the record." 1 Blackf., 16 and 40; 1 Bibb, 304.

The Supreme Court of Florida has, too, in more than one instance, considered and reviewed charges that were not excepted to and not presented in any bill of exceptions, and not presenting the evidence of having been given by the judge that is here afforded as to the charges complained of. See Fash vs. Clark and Ferris, 8 Fla., 19; Ib., 31; Ib., 33; and see 5 Fla., 423, 466, 470; 16 Ohio St., 348.

"The court fully recognize the doctrine that, upon a writ of error, it is its province to look beyond the bill of exceptions and consider errors apparent upon the face of the record." 5 Fla., 470.

If it were necessary, why, in view of our peculiar statute, might not these charges in *favorem vitae,* being signed and attested by the judge, which is what gives force to a bill of exceptions, be treated as in the nature of a bill, in conformity to the suggestion contained in Duggan vs. State, 9 Florida.

Your petitioner prays your honors to observe that he does not except now to all the charges because of error in the propositions of law they announced when given, but he *complains* here that the record shows error in the omission of duty by the judge; an error, we repeat, that did not and could not appear to us until after the charge had been "filed in the case" and had become "a part of the record."

Presuming that the jury knew the law, and supposing that they took the charges with them, may they not have disregarded them as not fulfilling the legal requirements?

The true doctrine must be, we venture to suggest, that whenever the record in a case involving the life or liberty of the citizen discloses that an error of any kind has been committed, a new trial must be awarded. His counsel may through inadvertance or ignorance have failed to remark the error at the time of its occurrence, but he should not, therefore, if it can be legally shown to the appellate court, forfeit his life or liberty.

Unquestionably, it seems to us that the failure to perform any duty imposed upon him in the course of a trial for felony, to the performance of which the defendant has a right, is error, and it was altogether unnecessary for the legislature to add such a statement to section 8, chapter 138. Such statement in the act made the omission no more nor no less an error.

The authorities referred to in the opinion under consideration show that error apparent of record may be here for the first time complained of, *e g.,* where the oath is set

out and appears not to conform to that required by law albeit the defendant sat by, heard it, and took no notice of, or exception to it. So while the general rule is that in order to a review in the higher court of a charge of the court below touching its correctness, there must have been an exception taken at the time it was delivered to the jury, when by the law the charge cannot otherwise get upon the record. Yet the rule is not universal. See Fash vs. Clark & Ferris, 8 Fla., 16.

If it shall be finally determined that the record does not show that any charges were given, then your petitioner has great confidence that he will be able to show, by argument and authority, upon a rehearing, that the judgment should be reversed for error in not charging; and now respectfully calls the attention of the court to the language of section 1, chapter 2096 and section 2: "It shall be the duty of the judge presiding to charge the jury * * * *and* the charge must be 'only upon the law,'" *and* must be in capital cases "wholly in writing," *and* must be "signed and sealed," *and* must be "*by him filed in the case and form a part* of the record *immediately after* delivered."

There is no such language in this chapter as "where the judge charges," or "if he charges."

Chapter 138, section 8, revised and repealed by this chapter (2096) did contain such, or equivalent language as that last quoted, and did not make it "the duty of the judge" in all felonies punished capitally "to charge wholly in writing;" but, did, like 2096, confine the charge to the law and provide "that charges *made* by judges in all criminal cases shall be * * * filed in the case." Writs of error being in all cases (criminal) writs of right and going to the entire record and the charge when made becoming part of the record, the latter clause of the said section was unnecessary, and is meaningless, and hence was omitted from chapter 2096, acts.

The court in the opinion under consideration remark, (referring to chap. 138): "The absence from the record of a charge signed by the judge, a charge having been made, was under that section evidence of error for which a judgment might be reversed." We ask why? and we hazard the answer, because the law required to be written and filed, and made *part* of the record, and the violation of the law would have been none the less error had not the statute said so, and the statute saying so makes it none the plainer.

These "plain and positive requirements that cannot be disregarded," according to Dixon vs. State, *supra*, have elsewhere been spoken of as "formalities" that may be waived by the parties. Southern Express Company vs. Van Meter. We shall not now question this proposition as applied to civil controversies involving property rights in which individuals alone are interested; but we think it would be applied with great reluctance to a case affecting the life or liberty of a citizen in which the commonwealth is concerned. But in any case we do not readily perceive how these requirements can be dispensed with more readily than the formalities prescribed touching bills of exception. The requirement of formalities in both instances is created by the same instrumentality—emanates from the same source.

If the judge may, without error, omit one of these requirements or formalities, he may omit them all, and the statute becomes a dead letter.

If the defendant may forfeit his life or his liberty by an implied waiver of one of these formalities or requirements, it is difficult to perceive why he may not thus waive any other "express and positive requirement" or "formality" prescribed by law; but we know that some of these, *e. g.*, the arraignment, trial by jury, &c., he cannot in felonies.

If your honors shall grant to your petitioner a rehearing

he will not be without faith in his ability to show the court that the evidence incorporated in the transcript ought to be considered in order to test the correctness of the charges, and to show that the judgment of murder in the second degree cannot be sustained, and thus enable the court to undo the great wrong to him, and the bringing shame upon the law, of a conviction of having committed a homicide "by an act imminently dangerous to others and evincing a depraved mind regardless of human life *although without any premeditated design to effect the death of any particular individual,*" upon evidence not even remotely pointed to such an act, but simply showing an encounter with one individual.

Your petitioner submits another reason why his petition should be granted, that the questions to be determined are mostly of first impression in this State, and it is of general interest that they should be finally settled upon the largest and most exhaustive consideration.

And your petitioner hopes that it will none the less commend his application to your consideration, if he shall invite your attention to the startling haste and rapidity with which the proceedings in this case were conducted in the court below, as evidenced by the transcript, which may in great measure account for the omissions from the record, which have operated so gravely to his detriment; nor he trusts will he be deemed guilty of an impropriety if he here places upon the record the fact that neither Mr. Hartridge nor Mr. Walker were of counsel for him in the court below.

And your petitioner humbly begs the pardon of your honors if he has transcended the rule of the honorable court in the matter of the petition, pleading his awful situation caused by circumstances beyond his control, and due, doubtless, so far as his counsel below were concerned, to the haste and excitement attending the conclusion of the trial and

the sudden adjurnment of the court after the verdict was rendered.

Suppose a case where section 8 had been violated in every respect, and thereupon a writ of error. The fact that the judge charges the jury need not appear of record unless reduced to writing &c., and suppose it did not appear, where would be the evidence of the violation? There would be none. How then could it be made to appear of record? The only way known to the practice would be to have the judge in some way certify it. But this he would not be bound to do, unless exception to his failure had been taken at the time, and then the exception would have presented the error without the aid of the statute.

Errors and exceptions have different technical significations; the one is predicated of the record in the court above, the other goes to matter transpiring in the court below, and is taken to bring the matter on the record for assignment of error, and this is the only office of an exception.

GOTTSCHALK POTSDAMER,
By John T. Walker, his Attorney and of Counsel.

THE CHIEF JUSTICE delivered the following opinion upon the petition for a rehearing:

Upon considering the petition for a rehearing in the case and a review of the opinion already filed, we are still satisfied that we have conformed in our decision to the established rules of law prevailing here from the time of the organization of this court, and in all the States excepting Pennsylvania. That rule is that where it is alleged that an error has been committed by the judge upon a trial, except in rendering a judgment upon demurrer or plea in abatement, motion to quash, change of venue, and the like, or in rendering final judgment, the record must show that an exception was taken to the action of the court.

The rule in Pennsylvania is that exceptions to the charge of the court may be tendered at any time before the delivery of the verdict, and that a plaintiff in error may assign error in an opinion on any point material to the issue appearing on the bill of exceptions, although the error was not particularized in stating the exceptions below. (1 Bin., 38; 2 Bin., 308.) And the Justice in 1 S. & R., 304, said that the statute, (13 Edw. 1,) gave the bill of exceptions in order that the points determined should be introduced into the record and decided on by the court of error. In 1806, the legislature, without superseding the bill of exceptions, provided still another practice for bringing opinions upon the record, that the judge should reduce the opinion to writing as given, with the reasons therefor, and file the same of record in the cause.

The courts hold (53 Penn. St., 127) that any error appearing in the opinion or in the record might be assigned for error in the appellate court without an exception taken in the court below, that a writ of error goes to the *whole record,* and if perchance any error appears therein it might be taken advantage of upon errors assigned even though no objection or exception was taken in the court below, and no opportunity given to that court to correct any mistake or inadvertence. To adopt such a rule in this State, where the practice has become established otherwise by the uniform decisions of this court as firmly as though dictated by express statute, would be an act of judicial law making and repealing which we are not ready to do. The duty of courts is to decide causes according to established principles and rules of law. That these differ in Pennsylvania with those in this State or in other States is due to the legislation or the early action of their courts, or both.

Our law and practice are to the effect that where rulings and conduct of the court below do not violate fundamental rights, and no objection or exception be taken, the party

affected is held to have waived any right to surprise the court and opposing parties by starting an objection in the appellate court for the first time. Without considering the ingenious and earnest criticism of the opinion filed, contained in the petition for a rehearing, we do not think it necessary to reiterate our convictions as there expressed.

The petition is denied.

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SEVENTEENTH VOLUME FLORIDA REPORTS.

ABATEMENT. See *"Plea in Abatement."*

ABETTORS. See *Criminal Law*, 19.

ACCESSORY. See *Criminal Law*, 19.

ACCOUNT. See *"Administrators and Executors,"* 11, 12, 14, 15, 16, 18; *Books of Account; Guardian and Ward*, 2; *Trusts and Trustee* 6, 7, 8.

ACQUITTAL. See *Criminal Law*, 22, 27, 28; *Statute of Limitations*, 2.

ACTION. See *Bills of Particulars; Contracts*, 1, 2; *Trespass, Verdict.*

ADMINISTRATORS AND EXECUTORS. See *Courts (Circuit*, 3,) *(Probate and County); Evidence and Witnesses*, 9, 16, 18; *Guardian and Ward*, 2; *Judgment*, 6; *Non-Claim; Statute of Limitations*, 3, 10, 11, 12, 13; *Trusts and Trustees*, 2, 5, 8.

1. Where a grant of letters of administration is collaterally assailed, whether an appraisement was made or whether the party applying for the letters failed to allege in petition that he was twenty-one years of age, are immaterial in a case where the necessary jurisdictional facts are stated in the pleadings bringing the matter before the court, or appear on the face of the record. Under the statutes of this State, the Judge of Probate had a general and exclusive jurisdiction in the matter of granting letters of administration. In this case, the death of the intestate, possession at the time of death of goods, chattels and lands in the county in which the letters were applied for, and that the intestate had a mansion house in that county, are alleged in the petition,or appear in the record, and this is sufficient. *Emerson* vs. *Ross' Executrix et als.*, 122.

2. Where a person entitled to distribution of the estate in the order of consanguinity applies for letters of administration, a previous publication of citation is not required. *Id.*

3. The oath of an administrator is properly filed in the office of the Judge of Probate. *Id.*

ADMINISTRATORS AND EXECUTORS—(*Continued.*)

4. Under the statutes of this State regulating the sale of lands by administrators under an order of the Probate Court to pay debts, no petition was required. A failure to file a petition or the filing of a petition failing to set up the necessary jurisdictional facts, is immaterial. Where notice of intended application is given, as required by statute, and the court in its order of sale finds and recites the existence of the jurisdictional fact, and the record discloses jurisdiction, it is sufficient, and the deed is not void for want of power shown. *Id.*

5. The recorded deed of an administrator upon a sale of the lands of a deceased intestate for value and without notice will vest a good title as against a prior unrecorded deed of the deceased intestate. *Id.*

6. An administrator in this State has the right of entry into and the right of possession of the real estate of his intestate, and can maintain ejectment. His right to recover follows his right to rents and profits, and because lands are assets in his hands with a power to cultivate the same. The basis of his action is the title of his intestate. His estate, interest and power, after recovery, is limited by the incidents and duties which the law attaches to him, and with which his possession is surrounded. *Sanchez, Administrator and Administratrix* vs. *Hart,* 507.

7. When it appears that there were two executors against whom judgment was rendered and execution issued, and the execution is destroyed, notice of an application to re-establish the writ, served upon a person as executor of one of the defendant executors and "as such executor of the estate of the first testator," without it appearing that the co-executor of the first testator had died or renounced or been removed, is not such notice as will bind the estate of the first testator or authorize an order re-establishing the lost execution. *Hart's Executor* vs. *Smith,* 767.

8. When one of several executors dies the executorship devolves upon the survivors, and no interest therein devolves upon the executor of the deceased executor, but upon the death of the survivor his executor becomes the executor of the first testator. *Id.*

9. An administratrix is entitled as widow, having elected a child's part, to one-half of an estate. The father of her husband is entitled to one-half. Under such circumstances the administratrix, without the order of a court of competent jurisdiction, cannot distribute the estate. An instrument purporting to assign to each their respective interests, having no words of conveyance as between each other, may be effective in equity when assented to by the parties as a contract to convey. It does not vest the legal title in either party. *McRae* v. *McMinn,* 876.

ADMINISTRATORS AND EXECUTORS—(*Continued.*)

10. After the expiration of six months from the taking out of letters of administration the administrator may be compelled to make distribution upon the persons entitled giving bond and security to refund a due proportion of any debts or demands which may afterwards appear against the estate, and all costs which may be awarded on the same; provided such debt or demand appears within two years after granting letters of administration. The practice in such cases is to make the execution of the refunding bond a condition precedent to the payment of the distributive share. *Sanderson's Administrator* v. *Sanderson*, 820.

11. The general rule of accounting in such cases, as heretofore announced by this court, (5 Fla., 556,) is that interest at the rate of eight per cent. will be charged, the interest upon the balance found at the beginning of a year to be carried into the balance struck at its close, computing interest for the next year upon the whole, no interest being computed upon the sums when received. *Id.*

12. An administrator upon a solvent estate upon his qualification, should pay the debts and wind up the estate as soon as practicable. Investments in mortgage securities, not approved by the Probate Court, are unauthorized. When such investments are made, the heir may take such as he desires and reject those not acceptable to him. The administrator may be charged with such amounts of interest or principal as he has actually collected on the rejected securities in his annual returns, in which event he will be charged with only simple interest on the balance of principal for the time during which interest was not collected; or, at the option of the heir, the administrator may be charged with the principal sum invested in the rejected security, with annual rests as prescribed for his general accounting. *Id.*

13. An exhibition or presentation of a claim to the administrator, within the limitation of one year from the issuing of his letters (section 15, chapter 1869, laws) stops the running of the statute of non-claim, as well as the statute limiting the time for actions against an administrator. The creditor is not obliged to reduce his claim to judgment. What constitutes an exhibition within the meaning of the statute considered and defined. *Id.*

14. The general rule is that an administrator may or may not plead the general statute of limitations against a claim not barred in the lifetime of the intestate and otherwise justly due. This rule, however, is not applicable to statutes in terms limiting the time in which an action may be brought against him in his *representative capacity as administrator*. He should be charged with all the debts paid which were barred by such statutes. Section 15, of the act of February 27, 1872, chapter 1869, laws, is such a statute. The

ADMINISTRATORS AND EXECUTORS—(*Continued.*)
terms, "after the expiration of that time," in the section referred to, considered and explained. A majority of the court hold that where notice calling in claims under the statute of non-claim had been given anterior to the passage of the act prescribing the limitation of one year, does not operate. *Id.*

15. Upon an acounting in the master's office betwen the distributee and the surviving partner of the intestate, on account of the partnership transactions, the surviving partner, who is administrator, is chargeable with only simple interest upon sums found due by him; also in like manner if the balance is found against the estate, it is charged with simple interest only. *Id.*

16. An administrator of a solvent estate has a right in this State to retain a debt due himself not barred in the lifetime of the intestate or at the date of the issuing of his letters. It is not necessary that he should file his claim with the Judge of Probate, or present it to himself, to save the operation of the statute of limitations or the statute of non-claim. Upon final settlement he has a right to have his claim satisfied, if it is not of such a character as a presumption of payment will operate. *Id.*

17. Where the fair presumption and conclusion from the evidence is that an administrator, who was the surviving partner of the intestate, did not at the commencement of the suit know of the reception of moneys on partnership account by the deceased, and the lapse of time has not been sufficient to make it a stale claim, no presumption of payment arises. *Id.*

18. Under the statutes of this State an administrator asserting his own claim against the estate in the master's office, stands in the relation of any other creditor, so far as testifying to transactions and communications had by him with the deceased in reference to his own debt is concerned. He is disqualified except as to matters to which the distributee is examined on his own behalf. As to the claim of any other creditor against the estate, he is a competent witness to transactions and communications with the deceased intestate. *Id.*

19. Wherever either heir or distributee puts the administrator to proof of a voucher regular and proper on its face, the payment of which is sworn to by the administrator, such heir or distributee, in the event the claim is established, should be charged with all costs attending such proof. *Id.*

20. When it is necessary for a party to establish a *prima facie* title to lands in order to maintain a suit to prevent or remove a cloud upon the title, and he shows that his grantor purchased at an administrator's sale in 1864, and, in connection with the administrator's deed shows a decree of the Probate Court ordering the sale, upon

ADMINISTRATORS AND EXECUTORS—(*Continued.*)
petition for such sale for the purpose of distribution and payment of debts, a citation to persons interested in the estate will be presumed until the contrary is shown, especially when it appears that the heirs acquiesced in and ratified the sale at the time, and the purchaser and his grantee has had the undisturbed possession under such sale and deed for ten years. *Wilson* v. *Matheson* 630.

AMENDMENT.

OF CITY ORDINANCES. See *"City of Jacksonville"* 2.

OF PLEADINGS. See *Criminal Law,* 18; *Pleadings* (*Law*) 4, 16; (*Equity*) 12.

APPEALS. See *Appellate Practice; Judgment,* 10.

1. Appellant failing to file a copy of the record on the first day of the term of this court, in accordance with the statute, the appeal will be dismissed upon appellee's producing the certificate required by the rule. It is no answer to such motion to say that no final judgment has been entered in the Circuit Court. *Webster* vs. *Barnett,* 119.

2. Where the papers on file fail to show that an appeal was perfected or that a writ of error has been issued, the cause will be dismissed, no application being made to supply the record. *Orange County High School* vs. *Sanford,* 120.

3. Where a deed purporting to have been executed under a power of a public and statutory nature is sought to be used in evidence, the power should be shown, and where the power is the order of a court of special and limited jurisdiction, and the record of the order or decree is presented, the question whether the deed was void for want of jurisdiction in the court to make the order or decree is a question of law for the court and not for the jury. Where, however, the opposite party, upon the introduction of the deed without the power, makes no objection, introducing subsequently the record of the order of the court, fails to ask the court to pass upon the sufficiency of the deed, relies upon instructions of the court covering the subject matter given at his request, and leaves the entire question to the jury, he cannot object to this action for the first time in an Appellate Court. The question here upon such an appeal is whether, upon the evidence, the finding of the jury was erroneous. *Emerson* vs. *Ross Executrix, et als.,* 122.

4. An assignment of error to the effect that the charge of the court is conflicting coupled with a failure to point out or suggest the precise nature of the conflict, no exception upon this ground being made upon the trial and no conflict appearing to the court is not available. *Id.*

APPEALS—(*Continued.*)

5. Where the charge of the court is principally as requested by the appellant, there is no exception of a general character to the other charges given, the appellant fails to point out any error and there is none to his prejudice apparent to the court a general assignment of error that the verdict is contrary to the charge of the court is not available. *Id.*

6. Where proceedings of the court alleged to be erroneous do not affirmatively appear of record, but only by way of recital in a motion of counsel which was denied, this court will not assume that such proceedings were actually had, and will not review a fact so recited. Counsel objected to the trial of a prisoner upon a certain count of an indictment on the ground that at a previous trial the count had been withdrawn; and a motion for a new trial was made uppn the same ground and denied, but the record did not show that there had been a previous trial or waiver of the count, and upon error it is held that the question is not presented by the record. *McNealy and Roulhac* vs. *State*, 198.

7. Where it is clear, looking to the statutes regulating the terms of Circuit Courts that a bond given in an appeal from a judgment at law was executed more than thirty days after the session of the court at which the judgment was rendered, the appeal will be dismissed. *Benbow* vs. *Marquis*, 236.

8. An appeal will be dismissed where there is from term to term a continued and persistent failure to file a petition of appeal. *Hull, et ux.*, vs. *Westcott*, 280.

9. No particular form of words is required by the statute or rules in taking an appeal from a decree in chancery. It is sufficient if the entry or notice of appeal shows that an appeal was intended. *Bauknight* vs. *Sloan & Co.* 281.

10. A bond is not required in an appeal in chancery except to make the appeal operate as a supersedeas. *Id.*

11. Where the record discloses objections to interrogatories not acted upon by the court, and there is no motion to suppress the depositions, or other like action by the party, or any action by the court, the objections must be treated as abandoned. *Jenkins et ux.*, vs. *Merritt*, 304.

12. An appeal from a final decree in a case in chancery commenced before the Code, but decided after its repeal, opens for consideration all prior interlocutory orders or decrees connected with the merits of the final decree. *Hyer's Executors* vs. *Caro's Executrix*, 332.

13. In chancery causes, in cases involving matters of account, where the books, or extracts therefrom, used before the master in stating an account, are not in the record certified to this court

APPEALS—(*Continued.*)
it is not the practice of this court to affirm a decree upon the presumption that the books contained evidence of independent facts in addition to what is reported or referred to by the master. *Id.*

14. No appeal can be taken until after the entry of final judgment in a suit at law. *Coons* vs. *Harlee,* 484.

15. Every paper considered by the Circuit Court in its action, whether it was properly considered or not, should be in the return to this court. A *certiorari* will be awarded to bring up evidence alleged to have been considered upon a motion in arrest of judgment. *Sedgwick* v. *Dawkins,* 555.

16. An appeal will be dismissed at any time during the term if it is discovered in a case at law that there is no final judgment in the record. *Sedgwick* v. *Dawkins,* 556.

17. If a party, after a judgment upon demurrer against him, amends his pleadings so that an issue is formed which is tried by a jury, he waives all exceptions which he might have taken to the judgment on demurrer, and will not be permitted to assign them for error in this court. *Mayo and Stokes* v. *Keyser's Executrix,* 744.

18. Counsel filing a brief as to only one of his assignments of errors and failing to embrace in his brief anything else, abandons the other errors assigned, and, as a matter of right, cannot require this court to consider them. *Southern Express Company,* v. *Van-Meter,* 783.

19. That the judge permitted leading questions to be asked a witness is the exercise of a discretion not reviewable in this court upon writ of error. *Id.*

20. While it is within the power of this court to consider points made here for the first time, if raised by the pleadings and proofs, yet care must be taken that neither party be permitted to surprise or mislead his adversary, or to make objections which, if made in the Circuit Court, might have been obviated. Hence, where, in the petition of appeal and original brief of appellant, there is no objection to an account passed by the master upon the ground that the items thereof were not proved, and there is nothing in the record to show that such an objection was made in the Circuit Court, this court will not consider such objection urged in a supplemental brief. *Sanderson's Administrators* v. *Sanderson,* 820.

21. If a party desires to have the ruling by the court upon the demurrer reversed, he must not plead over, but take his appeals from the final judgment perfected upon the demurrer. *Mayo and Stokes* v. *Keyser's Executrix,* 744.

22. In common law actions the evidence taken upon the trial is no part of the record, unless made so by bill of exceptions. In chancery

APPEALS—(*Continued.*)
causes all of the evidence taken is a part of the record without the formality of a bill of exceptions. Hence, in common law cases, in the absence of a bill of exceptions, action of the Circuit Court, taken with reference to facts which should appear by bill of exceptions, is presumed to have been justified by the evidence. In chancery causes, the presumption being that the record, as certified, contains all of the evidence, the action of the Circuit Court, based upon the evidence in the record, is to be examined with reference to the record, and the record is to be taken as containing all the evidence material in the cause. In equity causes any omission must be supplied by *certiorari*, which may issue at the instance of the appellee under the rules, or by the court in cases where it is satisfied that what is omitted is material in the consideration of the case. *Hyer's Executors* v. *Caro's Executrix*, 332.

23. An application for a continuance is addressed to the sound discretion of the court, and the action of the court will not be reviewed unless palpable unfairness is shown. *McNealy and Roulhac* v. *State*, 198.

24. This court cannot determine that the court below erred in denying a new trial upon certain specific grounds, unless the grounds are stated in the motion as made. *Pottsdamer* v. *State*, 895.

APPELLATE PRACTICE. See *Appeals, Assignments of Error, Bill of Exceptions, Brief of Counsel, Charge of Judge to Jury*, 4, 5, 6, 10, 11, 12, 16, 17, 18, *Costs, Courts and Judges, (Supreme Court,)* 1, *Criminal Law*, 12, 23, *Exceptions, New Trials*, 8, *Petition of Appeal, State, Verdict, Writ of Error.*

ARREST OF JUDGMENT. See *Criminal Law*, 20; *Judgment*, 10; *Jurors and Jury*, 3.

If the verdict of a jury in a criminal case is clearly against the law and the evidence, the court should grant a new trial, but if the indictment is fatally defective, judgment should be arrested after verdict. *Snowden* vs. *State*, 386.

ASSAULT WITH INTENT TO KILL. See *Criminal Law*, 25.

ASSAULT WITH INTENT TO MURDER. See *Criminal Law*, 22, 26.

ASSAULT WITH INTENT TO ROB. See *Criminal Law*, 22.

ASSESSOR OF TAXES. See *Schools*, 3.

ASSIGNMENT OF ERROR. See *Appeals*, 4, 5, 17, 18, 19, *Charge of Judge to Jury*, 4, 10, 16.

ATTACHMENT.
1. Where a plaintiff procures a writ of attachment upon ground

ATTACHMENT—(*Continued.*)
stated in his affidavit, that defendant was indebted to the plaintiff upon contract, that the debt was actually due, and that the affiant had reason to believe that the defendant would fraudulently part with his property before judgment could be obtained; and upon defendant denying on oath the several allegations in the affidavit, the issues to be tried, upon application to dissolve the attachment, are: whether defendant was indebted as alleged, and whether the *affiant had reason to believe* that the defendant would fraudulently part with his property, &c. *Meinhard Brothers & Co.* v. *Lilienthal,* 501.

2. Where the plaintiff's proofs upon such trial are such as to show that the conduct of the debtor, his manner of conducting his business, transferring loads of goods from his store to his residence, having goods shipped in the name of his clerk, studiously avoiding the creditor or his attorney, and the like, are such as would induce a prudent business man on learning the facts to suspect and believe that defendant would part with his property fraudulently before judgment could be recovered against defendant, and these proofs are not contradicted by defendant's evidence, a verdict in favor of defendant is against the law and the evidence, and should be set aside and new trial granted. *Id.*

ATTACHMENT FOR WITNESSES. See *Evidence and Witnesses,* 17.

ATTORNEYS AT LAW. See *Appeals,* 18, 20; *Judgments,* 2.

1. Attorneys at law, who are partners in the practice of their profession, and not partners *in trade,* according to mercantile law, have no implied authority to become parties to negotiable instruments and to bind the firm thereby, unless such authority is given by the terms of the partnership, or expressly given or recognized by both, or may be implied from the general habits of the partners in their business transactions. *Friend* v. *Duryee,* 111.

2. Under the Constitution of the State of Florida the Legislature has the power to levy a license or occupational tax upon lawyers. *Young* v. *Thomas,* 169.

3. One member of a firm is entitled to participate in sums received for professional services by the other member of the firm, notwithstanding the party paying the money swears no such sum was due, he, the party paying, having since its payment waived all right to its recovery against the firm and the member receiving it. *Sanderson's Administrators* v. *Sanderson,* 820.

4. One of two partners, as attorneys at law, has no right, in the absence of a special contract or custom, to share in sums realized by the other as commissions for sales of stock in a railroad company; nor can he share in sums realized for services other than those which belong to their professional relations. Where he alleges

ATTORNEYS AT LAW—(*Continued.*)
that a sum was realised by his co-partner for professional services, the burden of proof is upon him to establish it. *Id.*

BASTARDY.

1. The sums which the Circuit Court is authorized to condemn a party to pay in proceedings in bastardy towards the support of his child, are not debts within the meaning of the organic limitation that "no person shall be imprisoned for debt except in case of fraud." *Ex-Parte J. C. H.*, 362.

2. The statute regulating this special proceeding authorizing the court to require the father to give bond for the payment of such sums, it is within the power of the court to direct a party to remain in the custody of the sheriff, and to be imprisoned until compliance with its order. *Id.*

3. Inability to obtain the bond, insolvency of the party, and other like circumstances not involving any question as to the power of the Circuit Court, are matters of which, upon a *habeas corpus*, we cannot take cognizance. If they justify any action, that action must be by the Circuit Court. *Id.*

BILL OF EXCEPTIONS. See *Appeals*, 22; *Charge of Judge to Jury*, 12.

1. A bill of exceptions appearing in the record to have been signed after the expiration of the term at which the trial was had, and no order extending the time therefor having been made during term, will not be considered. *Webster* vs. *Barnett*, 272.

2. A bill of exceptions is a simple history of the case as tried, and should contain nothing more nor less than the facts as they appeared from the commencement of the trial until the final judgment. All objections, rulings of the court and exceptions thereto, should appear in the body of the bill in their proper and appropriate place, and will not be considered if upon separate pieces of paper made and filed subsequent to verdict, or in cases of motion for a new trial, or in arrest of judgment after the final judgment. *Gallaher* vs. *State*, 370.

3. A bill of execptions appearing to have been signed by the Judge after the expiration of the term, without an order having been made extending the time for preparing the same, is a nullity. *Potsdamer* vs. *State*, 895.

BILLS OF EXCHANGE AND PROMISSORY NOTES. See *Attorney at Law*, 1; *Garnishment*, 1 *and* 2; *Practice* (*in Circuit Court, Law,*) 1, 2, 3.

1. As between a *bona fide* holder for value of a negotiable promissory note transferred before due and the maker, a plea of want of consideration, or fraudulent consideration, constitutes no defense to an ac-

BILLS OF EXCHANGE AND PROMISSORY NOTES—(*Continued.*)
tion on the note, unless notice of the facts constituting such defense, at or before the transfer, is brought home to the holder, and a plea which does not allege notice is bad. *Hancock and Mills* vs. *Hale*, 808.

2. A non-negotiable note, secured by mortgage, in the hands of an assignee for value before it is due, is subject to the equities existing between maker and payee. *Reddish* vs. *Ritchie*, 867.

BILL OF PARTICULARS. See *Pleading* (*Law*), 4.

BONDS—
I. APPEAL. See *Appeal*, 7, 10; *Writ of Error.*
II. BASTARDY. See *Bastardy*, 2, 3.
III. COLLECTOR OF REVENUE. See *Principal and Surety*, 1, 2, 3, 4.
IV. COST. See Costs.
V. GUARDIANS. See *Guardian and Ward.*
VI. MUNICIPAL. See *City of Jacksonville*, 1, 3.
VII. SUPERSEDEAS. See *Appeal*, 10.
VIII. WRIT OF ERROR. See *Writ of Error.*

BOARD OF CANVASSERS—STATE, &c. See *"Elections and Election Returns."*
BOARD OF PUBLIC INSTRUCTION. See *Schools*, 1, 2, 4, 7, 8, 9, 10.
BONA FIDE PURCHASER. See *Bills of Exchange and Promissory Notes; City of Jacksonville*, 3; *Vendor and Purchaser*, 6, 7.
BOOKS OF ACCOUNT. See *Evidence and Witnesses*, 1, 2, 3, 4.
BRIEF OF COUNSEL. See *Appeals*, 18, 20.
CERTIORARI. See *Appeals*, 15.

CHANGE OF VENUE.

1. An application for a change of venue is addressed to the sound discretion of the court, and unless it appears that the court acted unfairly and abused its discretion, there is no error. *McNealy and Roulhack* vs. *State*, 198.

2. The great respectability and influence of prosecuting witnesses in a criminal case, no undue influence having been exerted by them to create a prejudice against the accused, is not good ground for a change of venue. *Id.*

3. Nor is it good ground for changing the venue to another county that the people of a county are prejudiced against persons charged with certain crimes, there being no allegation of any special prejudice against the accused. *Id.*

4. Where, upon a stipulation being filed that the Judge should transfer a cause pending in the Circuit Court of one of the counties in his circuit to another particular circuit, designating it, and that the cause be heard and decided by the Judge of the latter circuit,

CHANGE OF VENUE—(*Continued.*)

an order is made by the Judge of the former circuit that the cause be referred to the Judge of the latter circuit, but the order is silent as to changing the venue or transferring the cause to any county in such circuit; *Held*, That no change of venue was effected, but the venue and record remained in the former court, and that upon a trial thereof and rendition of a final decree by the latter Judge and the transmissal of the papers to the clerk of the former court and the entry of the decree by him, the decree is the decree of that court, and an appeal should properly be taken from it as the decree of such court. *Bauknight, et al.* vs. *A. M. Sloan & Co.*, 281.

5. When the place of trial is changed from one country to another, it must be done in the manner provided by law, in order to give the court held in the county where such trial is had jurisdiction of the case, and such proceedings must appear in the record. *Curry* vs. *State*, 683.

6. When the judge is of the opinion that it is impracticable or inexpedient to form a grand jury in any county for reasons mentioned in sub-chapter 13, section 14, of chapter 1037, laws of 1868, to make it lawful for the grand jury of any other county in the same circuit to indict any person for any offence committed in the county first mentioned in said section, such opinion of the judge should be embodied in an order and made a part of the record in the case. *Id.*

7. The statute regulating a change of venue upon affidavit setting up a fear that a party will not receive a fair trial on account of the judge "being prejudiced" limits the power of the court to one removal; a second change of venue being unauthorized, consent or waiver of errors cannot give it validity. *Johns' Executors* vs. *Johns*, 806.

CHARGE OF JUDGE TO JURY. See *Appeals*, 5, 6; *New Trial*, 3, 5.

1. It is no error to permit the jury to take with them to their consultation room the charge of the court, nor is it error to recall the jury, withdraw from their consideration erroneous instructions, and in lieu thereof to give additional ones. *Coleman* vs. *State*, 206.

2. The original charge having been properly signed and sealed, the court recalled the jury, struck out certain of his instructions which had been excepted to, and gave others in writing in place thereof; *Held*, That those given in place of those stricken out must be considered as only amendments to the original charge, and that they became a part of such original charge. *Id.*

3. The statute of 1877 (chap. 2096) requires that when either party shall present to the judge written instructions on points or exceptions arising during the trial, praying that they be given to the jury,

CHARGE OF JUDGE TO JURY—(*Continued.*)
the judge shall declare to the jury "in writing his ruling thereon as presented and pronounce the same to the jury as given or refused;" and the judge is also required to sign and seal such instructions as given or refused, and file the same in the case; *Held,* That a non-compliance with these statutory requirements was error. *Baker* vs. *State,* 406.

4. The charge of the court should be confined to the law of the case and to the issues made by the pleadings, so that the jury be not misled, but error cannot be assigned upon an erroneous or immaterial charge, unless excepted to at the proper time. *Meinhard Brothers & Co.* vs. *Lilienthal,* 501.

5. A general exception to the charge of the judge to the jury is not available on error, if any one of the propositions contained in such charge is correct. *Burroughs* vs. *State,* 643.

6. During the trial, the counsel for the defendant reduced to writing, and gave to the judge a proposition he desired him to embody in his charge to the jury. Subsequently in charging the jury, the judge neglected to give such proposition, or the substance thereof, to the jury. Defendant's counsel did not call the attention of the judge to such request, and failed to note an exception; *Held,* That defendant's counsel abandoned his request, and that there was no error. *Id.*

7. Judges of the Circuit Courts of this State may charge juries trying felonies not punishable capitally, and misdemeanors, orally; unless before the evidence in the case is closed, the State's attorney, or the attorney or attorneys, for the defendant or plaintiff, or the parties themselves, shall, in writing, request such Judge to charge the jury in writing. (Chapter 2096, Laws 1877.) *Id.*

8. The judge having refused to give instructions asked for by the defendant, and having given oral instructions, subsequently and before the jury retired gave the jury written instructions offered by the plaintiff, saying to the jury that the written instructions thus given were substantially the oral instructions he had given, and that he adopted them as the instructions of the court. This is a compliance with the statute (chapter 2096, laws,) requiring charges in cases of this character to be wholly in writing. *Southern Express Company* vs. *VanMeter,* 783.

9. If the charge given by the judge covers the entire case, and submits its properly to the jury, he may refuse to give other instructions. *Id.*

10. A party cannot, by his silence in the Circuit Court, waive the failure of the judge to put his instructions in writing, or to sign and seal them, or to do other things of this character; and after having had his chance before the jury, urge upon a motion for a new trial,

CHARGE OF JUDGE TO JURY.—(*Continued.*)
or here, for the first time, the omission as error; he must except before the jury retires. The case of Baker vs. The State, 16 Fla., 410 explained. *Id.*

11. Chapter 2096, laws, is a revision of the statutes regulating charges to juries; it covers all cases, civil and criminal; it repeals section 8 of the act of January 4, 1848, chapter 138, laws, and all of the act of January 3, 1848, chapter 140, laws. *Id.*

12. If the instructions of the court are signed and sealed by the judge, they become a part of the record; but in order to review here any exception taken to them, the exception must be authenticated in a proper manner by the bill of exceptions, embracing so much of the proceedings upon the trial as is necessary for the consideration of the exception taken. *Id.*

13. In a criminal prosecution, not capital, it is not required of the judge to deliver his charge, or to give his rulings upon instructions asked for by counsel, to the jury in writing, unless the *request* so to charge is made by counsel or parties in writing, before the close of the testimony. Construing chapter 2096, laws of 1877. *Sherman* vs. *State*, 888.

14. It is not error if the judge refuse to give instructions asked for, however pertinent, if the same in substance and effect has already been given by him to the jury. *Id.*

15. It is not necessary for the judge to read to the jury the instructions asked for by counsel when he refuses to charge as requested. It is only required in such case that he give his ruling thereon as "refused," without informing the jury what is contained in the instruction prayed for. *Id.*

16. The statute of 1877, chapter 2096, requires charges by the court to the jury, and the ruling of the judge upon instructions proposed by counsel to be in writing and signed and sealed by the judge, and filed immediately after delivered, when they form a part of the record. In order to assign error thereon in the appellate court, either as to the substance of the charge or the ruling of the judge or the omission of the judge to sign and seal the same, exceptions must appear by the record to have been duly taken by a party or counsel to any error or omission or refusal of the judge. *Potsdamer* vs. *State*, 895.

17. The eighth section of chapter 138, laws of 1848, was repealed by the act of 1877, chapter 2096, the latter being a revision of the law on the subject matter. *Id.*

18. An exception to the substance of a charge or ruling of the court upon instructions, duly taken and appearing in the record signed by the judge, will be considered, though the charge or instruction is not sealed. *Id.*

"CHILD'S PART." See *Administrators and Executors,* 9; *Descents; Pleading, (Equity,)* 9.

CIRCUIT COURTS AND JUDGES. See *"Courts and Judges."*

CITATION. See *Administrators and Executors,* 2, 20; *Courts and Judges (Probate and County)* 2.

CITY OF JACKSONVILLE. See *Constitutional Law,* 8.

1. The City of Jacksonville has, under its charter, the power to issue bonds for municipal purposes. The drainage of creeks, swamps and ponds around the city, the laying of strets, and the construction of sewers and water-works, are methods by which the health, convenience and comfort of the residents of the city are directly affected, and are municipal purposes. *Greeley* vs. *City of Jacksonville, et al.,* 174.

2. Neither the Constitution of this State, nor the charter of the city of Jacksonville, prescribes any particular form in which the amendment or repeal of an ordinance is to be had. To the extent that the provisions of a subsequent ordinance are plainly in conflict with a former one, the former is repealed by implication. *Id.*

3. As against a *bona fide* holder for valuable consideration of bonds of the character authorized by the charter of the city Jacksonville, and the action of its council, to be issued in this case, irregularities in the matter of giving notice of the election authorizing their issue is not available, nor is the fact that an extended record of the ordinances authorizing such bonds was not made at the time effective to relieve the city of its obligations, even in a direct proceeding against such issue before the bonds reach the hands of a *bona fide* holder for value. If it appears that such action was taken by the city it is sufficient. *Id.*

CLERK OF CIRCUIT COURT. See *Judgment,* 3, 4, 5.

CODE, CIVIL. See *Practice.*

COLLECTOR OF REVENUE. See *Principal and Surety,* 2, 3, 4; *Taxation and Taxes,* 1.

COMMON CARRIERS.

1. An express company belongs to that class of carriers who undertake to make a personal delivery of the goods to the consignee. It is held to great strictness in the performance of this duty. Such company, although it may not have been the first carrier to which the package was delivered, yet if its line extends to the point of destination, and it receives the package, its duty is to make personal delivery in accordance with the address on the package, and if it is delivered elsewhere than as addressed, or to a wrong person, the company is liable for a consequent loss. In this case a party forged a telegram in the name of another person, requesting a

COMMON CARRIERS—(*Continued.*)
national bank to forward to Gainesville, Florida, five hundred dollars to this other person; upon the telegram being received, and the agent of the other person giving his note for the money (which was subsequently paid,) the national bank forwarded the money as desired by express. The express company delivered it to the sender of the telegram. The agent making the delivery knew that the party was a stranger who had just arrived in town. The keeper of the hotel, with whom the stranger lodged, called with the stranger for the package and treated him as the party to whom it was addressed, but there was no identification or request by the agent for an identification; *Held*, That while the hotel keeper may have been a person known to the agent as a man worthy of trust and confidence, the company was liable for the loss occasioned by the delivery to the wrong person. *Southern Express Co.* vs. *VanMeter*, 783.

CONDITIONS. See *Wills,; Mortgage*, 5, 11.

CONSTITUTIONAL LAW. See *Attorneys at Law*, 2; *Bastardy*, 1; *City of Jacksonville*, 2; *Domicile; Elections and Election Returns*, 14, 16; *Homestead*, 1, 2, 8; *Pleading*, (*Law*) 18; *Prohibition*, 2.

1. The courts have no power to control the action of the Governor in the discharge of any duty pertaining to his office under the laws of the State. *State, ex rel.*, vs. *Drew*, 67.

2. The issuing of a commission or a certificate of election, required by law to be issued by the Governor, though ministerial in its nature, is yet an executive act pertaining to his office as the Chief Magistrate of the State. *Id.*

3. Each department of the government of the State is independent of the other in the performance of its own duty, and one cannot control the other in such performance without destroying this independence. *Id.*

4. The person of the Governor is subject to the process of the courts only in reference to private acts, and not pertaining to executive functions imposed by the Constitution or laws. *Id.*

5. In respect to his executrix duties as Governor, he alone may judge of the manner in which he will perform them, and the judicial department may determine the effect of acts performed. *Id.*

6. Chapter 2092 of the Laws of Florida, approved February 7, 1877, providing that "every misdemeanor of which the Circuit Court shall have jurisdiction may be tried upon presentment or indictment by a grand jury, or upon information filed by the State Attorney, or the duly authorized prosecuting attorney of the Circuit Court," is not in conflict with sections 8 and 19 of the Declaration of Rights. *King* vs. *State*, 183.

CONSTITUTIONAL LAW—(*Continued.*)

7. Infamous crimes are defined to be such as subject a man to infamous punishment, such as disqualify him from being a witness. *Id.*

8. Under the statutes in force in this State anterior to 1879 two classes of municipal corporations were established: first, a city to contain at least three hundred registered voters; second, a town to contain less than three hundred registered voters. A statute of 1879 created a third class, to contain sixteen hundred or more registered voters leaving is discretionary with all cities having that number of voters to become a city of the third class, or to remain a city under the preceding statutes. The class created by the act of 1879 was to have powers and privileges different from the powers conferred upon the other classes; *Held,* That the statute of 1879 was a statute "regulating municipal business" within the meaning of Sec. 17, Art. IV. of the Constitution; that such a law must be "general and uniform operation throughout the State," (Sec. 18, Art. IV., Con.); that this statute was unconstitutional in that it wanted such "uniform operation throughout the State," and also because it could not constitute a part of a "uniform system of municipal government" as required by the Constitution. (Sec. 21, Art. IV.) *McConihe, et als., vs. State, ex rel.,* 238.

9. Where, in response to an alternative writ of mandamus directing the officers of a municipal corporation to show cause why they do not call an election for their successors in office, the respondents set up in defense legislative action extending their time, it is proper for the court to determine the constitutionality of the legislative action by virtue of which they claim it is not their duty to order the election. *Id.*

10. The determination of the constitutional question mentioned in the last note does not involve any judgment of ouster or determine the right of any party to any office. The respondents are treated as *de facto* officers, and the only judgment to be rendered in the cause is one directing the performance of a ministerial duty. *Ib.*

CONTINUANCE—See *Appeals,* 23, *Criminal Law,* 8; *Practice (Circuit Court, Law,)* 5, 6, 7.

CONTRACTS. See *Administrators and Executors,* 9.

1. A paper in the following words: "I hold for account of ship Kalliope the sum of one hundred and eighty-three dollars and twenty cents for towage to sea of said ship," signed H. B., which was delivered to the Master of said ship, and by him endorsed to K., who towed the ship to sea, is not in its terms a "writing whereby money is promised or secured to be paid," and does not come

CONTRACTS—(*Continued.*)
within the meaning of the act of November 23, 1828, (Thomp. Dig., 348.) *Bellas vs. Keyser,* 100.

2. Such a writing is a mere memorandum upon which assumpsit will not lie unless extrinsic facts are averred and proved not inconsistent with the terms of the writing, but explaining and rendering it intelligible and capable of enforcement as a contractor or promise to pay money. *Id.*

3. Where a person who cannot read or write is induced to make "his mark" to a writing, which is not read to him, and its contents not fully stated to him, and it is evident that he did not intend to consent to its tenor and effect, and he takes no benefit from it and does not ratify it, such writing cannot be held to be his voluntary agreement. In dealing with such a person it is incumbent upon the other contracting party to show, past doubt, that he fully understood the object and import of the writing, in order to charge him upon it. *May's Executors and Executrix* vs. *Seymour,* 725.

CONTRACT TO CONVEY LANDS. See *Administrators and Executors,* 9.

CORPORATIONS. See *"City of Jacksonville," Constitutional Law,* 8, 9, 10.

COSTS. See *State, Writ of Error.*

Wherever either heir or distributee puts the administrator to proof of a voucher regular and proper on its face, the payment of which is sworn to by the administrator, such heir or distributee, in the event the claim is established, should be charged with all costs attending such proof. *Sanderson's Administrators* vs. *Sanderson,* 820.

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COUNTY COMMISSIONERS. See *Schools,* 1, 2, 3, 4, 5, 6, 10.
COUNTY COURTS AND JUDGES. See *"Courts and Judges."*
COUNTY TREASURER. See *Schools,* 7. 8.
COURTS AND JUDGES—

I. SUPREME COURT. See *Appellate Practice.*

1. The prejudice contemplated as a cause to disqualify a Justice of this Court from setting in a case under the provisions of chapter 3120 of the laws of Florida, is a prejudice against a party to the cause, and an affidavit not setting up this fact specifically is insufficient. *Conn* vs. *Chadwick & Co.,* 428.

2. The jurisdiction of the Supreme Court to entertain proceedings in prohibition, as conferred by the Constitution of this State, is confined to the legitimate office of that writ, as defined by the common law, and a statute enlarging and changing the purposes

COURTS AND JUDGES—(*Continued.*)
of the writ, so as to confer a new and original jurisdiction of matters not contemplated by the Constitution, will not be recognized by this court as affecting its jurisdiction. *Sherlock* vs. *Mayor, &c.*, 93.

II. CIRCUIT COURT. See *Bastardy*, 2; *Practice* (*Circuit Court,*) 7.

1. Judges of Circuit Courts calling extra or special terms of their courts under chapter 1561, laws of 1866, have a right to direct as to what time such extra or special terms shall be adjourned. Thomp. Dig., 322, §4. *Bass* vs. *State*, 685.

2. The Circuit Courts have both common law and equity powers, but in exercising the different jurisdictions they act as distinct and independent tribunals. *Sanford* vs. *Cloud*, 532.

3. A court of equity has concurrent jurisdiction with the Probate Court over the administration of the assets of deceased persons. That annual accounts have been filed in the Probate Court do not divest a court of equity of this jurisdiction. After bill filed by heirs against the administrators praying account and distribution, and the suit is pending in the court of equity, annual accounts passed and approved by the Probate Court are not *prima facie* evidence of payment purporting to have been made. The master should require the accounts to be proved if it is demanded. *Sanderson's Administrators* vs. *Sanderson*, 820.

III. PROBATE AND COUNTY COURT. See *Courts and Judges*, (*Circuit,*) 3; *Practice*, (*Probate Court*); *Administrators and Executors*, 1, 2, 4, 20.

1. Power was granted to the probate courts by Chapter 1358, Laws of 1862, to order the sale of real estate of decedents for the purpose of distribution. *Wilson, et al.* vs. *Matheson*, 630.

2. When it is necessary for a party to establish a *prima facie* title to lands in order to maintain a suit to prevent or remove a cloud upon the title, and he shows that his grantor purchased at an administrator's sale in 1864, and, in connection with the administrator's deed, shows a decree of the Probate Court ordering the sale, upon petition for such sale for the purpose of distribution and payment of debts, a citation to persons interested in the estate will be presumed until the contrary is shown, especially when it appears that the heirs acquiesced in and ratified the sale at the time, and the purchaser and his grantee has had the undisturbed possession under such sale and deed for ten years. *Id.*

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COURTS AND JUDGES—(*Continued.*)
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COVENANTS. See *Homestead and Exemptions*, 8; *Vendor and Purchaser*, 2, 3, 4.

CRIMINAL LAW. See *Arrest of Judgment; Homestead and Exemption*, 5; *New Trial*, 1, 2, 3, 4, 6, 7, 8; *Statute of Limitations*, 1, 2; *Change of Venue*, 1, 2, 3.

1. Infamous crimes are defined to be such crimes as subject a man to infamous punishment, such as disqualifies him from being a witness. *King* vs. *State*, 183.

2. It is not necessary that an information in a criminal proceeding contemplated by this law should be presented by a grand jury. If presented by the "State Attorney or the duly authorized prosecuting attorney of the Circuit Court," entered in the minutes of the court and filed, it is sufficient. *Id.*

3. Where the information charged that the house was kept "for the purpose of prostitution and lewdness," held, that it was not double or multifarious, and if sufficient of the allegations are proven to constitute an offence, there may be a conviction. *Id.*

4. Upon the trial on an information for keeping a "house of ill fame, resorted to for the purposes of prostitution and lewdness," evidence of the reputation of the house and those who visit it may be given. *Id.*

5. In order to warrant a conviction there must be proof that the defendant was the keeper of the house. *Id.*

6. On the trial upon an information for a misdemeanor, it is not only necessary to state in such information the county or place in which the offence was committed, but the proof must sustain that allegation. *Evans* vs. *State*, 192.

7. On the trial for a misdemeanor the prosecutor must show that the offense was committed within the time limited by the statute for the prosecution of such offenses. *McCoy* vs. *State*, 193.

8. A continuance should not generally be granted in a criminal case merely on account of the absence of a witness as to the good character of the accused. *McNealy and Roulhac* vs. *State*, 198.

9. A furnishes land, mules and a certain quantity of provisions. B. furnished labor and all other supplies necessary to raise a crop, and they agree that one shall have two-thirds and the other one-third of what is made: *Held*, That they are tenants in common of the crop produced, and an indictment for larceny of the pro-

CRIMINAL LAW—(*Continued.*)
duct properly charged that it was the property of both A. and B. *Id.*

10. An indictment for procuring property under false pretenses should contain all the material facts which the prosecutor is bound to prove, among which is the ownership of the property alleged to have been obtained by reason of such false pretenses. *Ladd* vs. *State,* 215.

11. It should also contain an averment that the party was induced to part with the ownership of such property by reason of the alleged false pretenses. *Id.*

12. Where the record shows an indictment properly endorsed and filed, an arraignment, plea, trial and motion in arrest of judgment; *Held,* that it was too late, on a hearing in this court, for the first time to object that the record does not show that the grand jury presented to the court the indictment upon which the trial was held. *Gallaher* vs. *State,* 370.

13. Where the offense is one created by statute, it must be charged in the indictment in the very language of the statute, or in language of equivalent import. *Humphreys* vs. *State,* 381.

14. An indictment for an offence prescribed and defined by statute, must state all the facts and circumstances which constitute the offence, or the party indicted is not brought within the provisions of such statute. Id.

15. In an indictment for an offence created by statute, it is necessary that the defendant should be brought within all the material words of the statute, and nothing can be taken by intendment. *Snowden* vs. *State,* 386.

16. An indictment for a wilful and corrupt false swearing touching a party's qualifications as an elector, must set forth specifically the occasion of the administration of the oath. The general allegation, "being required by law to take an oath," is not sufficient in such case. *Dennis* vs. *State,* 389.

17. Where one in good faith takes the property of another, honestly believing it to be his own, or that he has a right to its possession, he is exempt from the charge of larceny, there being no criminal intent. *Baker* vs. *State,* 406.

18. An indictment was presented by a grand jury against Robert H. Burroughs. The defendant plead in abatement that his name was Robert Burroughs. The court permitted the State's attorney to specify in writing the fact that the indictment was found against Robert Burroughs, under the name of Robert H. Burroughs, such specification in writing being under chapter 1107 of the laws of 1861; *Held,* That the court had authority so to order, under and

CRIMINAL LAW—(*Continued.*)
by virtue of that act. *Burroughs* vs. *State*, 643.

19. An indictment was presented by a grand jury against one E. M. for an asault with intent to commit a rape, and also against A. M. for being present, "aiding, abetting and assisting the said E. M. the felony and intended rape to do and commit;" *Held*, That A. M. was indicted as a principal and not as an accessory, and, in the discretion of the court, might be tried either before or after E. M. *Montague* vs. *State*, 662.

20. An indictment which charges in one count two distinct offences, for which different punishments are provided by statute, is bad, and judgment thereon will be arrested. *McGahagin* vs. *State*, 665.

21. It is no objection to an indictment in this State, under chapter 1107, laws of 1861, that two or more offences are joined in separate counts, unless on an application to quash the indictment, or on a motion in arrest of judgment, the court shall be of opinion that the indictment was so vague, indistinct and indefinite as to mislead the accused and embarrass him in the preparation of his defense, or expose him after conviction or acquittal to danger of a new prosecution for the same offence. *Green* vs. *State*, 669.

22. When a prisoner, tried upon an indictment containing two counts, one for assault with a dangerous weapon with intent to murder, the other for assault with a dangerous weapon with intent to rob was found guilty by the jury of an "assault with intent to rob;" *Held*, That the legal effect of the verdict was to acquit the prisoner of the assault with intent to murder. *Id.*

23. Where an indictment in good form, endorsed "a true bill," signed by the foreman of the grand jury, filed by the clerk of the court, and properly endorsed by the State Attorney, appearing in the record, the prisoner having plead guilty, and no question having been raised as to its presentment in court by the grand jury, or objection taken, in the court below; *Held*, Such endorsement were sufficient evidence here of the presentment by a grand jury. Bass *vs.* State, 685.

24. If there was any defect in the record in regard to the presentment by the grand jury, it should have been taken advantage of in the court below, where such defect might have been corrected. *Id.*

25. The statute of 1832, (Thomp. Dig., 490,) providing a punishment of the offense of "assault with intent to kill," is repealed by, and the offense is embraced in sections 1, 34 and 46 of sub-chapter III. of chapter 1637, laws of 1868, by which an assault with intent to

CRIMINAL LAW—(*Continued.*)
murder, or with intent to commit manslaughter, is made a felony. *Sherman* vs. *State*, 888.

26. An indictment charging that S. committed an assault with intent feloniously, wilfully, maliciously, and of his malice aforethought to kill and murder, is an accusation of intent to murder. *Id.*

27. A verdict of murder in the second degree, or in any other degree of homicide, as defined by statute, may be sustained under an indictment for murder in the first degree; such verdict being expressly authorized by a statute of this State, as well as by the rules of the common law; the degree of the crime being determined by the jury from the facts proved. *Potsdamer* vs. *State*, 895.

28. A conviction of an offence of a minor grade is, in effect, an acquittal of the highest grade charged in an indictment. *Id.*

29. A sentence to the "State Penitentiary or State Prison" in this State is not ambiguous or in the alternative, there being but one institution for the confinement of convicts, and the statute uses both forms of words to indicate the same place of confinement. Id.

CROPS. See *Criminal Law*, 9; *Landlord and Tenant*, 1; *Vendor and Purchaser*, 1.

DAMAGES AND MEASURES OF. See *Pleading*, (*Law*,) 13, 15; *Vendor and Purchaser*, 4.

DECREES. See *Practice*, (*Equity*,) 2, 3, 6.

DEFAULTS. See *Judgment*, 3, 4, 5, 7.

DEMURRER. See *Mandamus*, 4; *Pleading*, (*Law*,) 7, 8, 9, 11, 12, 16, 17, 19.

DEMURRER TO EVIDENCE.

No demurrer to evidence should be allowed and no judgment thereon given, unless the party demurring shall admit upon the record all the facts which the evidence conduces to prove. *Hinote* vs. *Simpson & Co.*, 444.

DESCENTS. See *Administrators and Executors*, 9; *Pleading*, (*Equity*,) 9.

DIVORCE.

1. A plaintiff, in alleging a ground for divorce, must, as a general rule, do something more than allege the ground in the words of the statute. He must allege the facts upon which his general charge is based in such manner as to apprise the defendant of the acts complained of, as well as in such manner that the court may judge whether, the facts alleged being proved, they will support the general charge. *Crawford* vs. *Crawford*, 180.

2. It is essential to prove an intention to desert where the ground upon

DIVORCE—(*Continued.*)
which a divorce is sought is wilful, obstinate and continued desertion. Continued separation between husband and wife which may be consistent under the proofs with no intention to wilfully and obstinately desert, is not a desertion within the meaning of the statute. Id.

3. Indulgence in petulance, or the exhibition of temporary capricious and unjustified irritation and temper, does not constitute, within the meaning of the statute, the habitual indulgence of a violent temper. *Id.*

DOMICIL.
A registered voter and qualified elector in this State does not, under the Constitution of this State, lose his political domicil by a living in Washington City attending to the duties of a public office at that point, his family being at the same time on a visit to his father in the State of Massachusetts. *Dennis* vs. *State*, 389.

DOWER. See *Mortgage*, 11, 12, 13, 14, 15.
DUPLICITY. See *Criminal Law*, 20, 21; *Pleading*, (*Law*,) 7.
EJECTMENT. See *Administrators and Executors*, 6; *Executions*, 3; *Pleading*, (*Law*,) 8; *Statute of Limitations*, 4, 5, 6.

1. Ejectment will lie between co-tenants in cases where the co-tenant has been guilty of such violation of the plaintiff's rights as constitutes an ouster. *Gale, et ux.*, vs. *Hines*, 773.

2. A declaration conforming to the requirements of chapter 999, laws, is sufficient in such case if it describes the undivided interest of the plaintiff. An allegation of an excusive possession by defendant, amounting to a denial of the right of the co-tenant plaintiff, is not necessary. This can be put in issue by the plea of the general issue. *Id.*

ELECTION AND ELECTION RETURNS. See *Domicil*, 1; *Mandamus*, 1, 2, 3, 4, 5, 8, 9; *City of Jacksonville*, 3.

1. A return by election inspectors, in which the votes cast for a person are given twice or repeated, constitutes no ground for refusing to include such return in the statement or certificate by the county canvassers, it being on its face a mere verbal repetition, and not an atempt to mistate the votes cast. The fact that the statement sent to the clerk contained such repetition, while that sent to the County Judge did not contain it, does not create such a variance between them as to authorise their rejection. *State, ex rel.*, vs. *Board County Convassers*, 9.

2. When the jurat to the oath of inspectors of election, is not signed or when the inspectors have not been sworn, but have acted as such and made proper returns, their acts are valid and their return of election should be counted . *Id.*

ELECTION AND ELECTION RETURNS—(*Continued.*)

3. A statement in the caption of inspector's returns forwarded to the judge that the election was held under an act of 1868 and the amendments thereto, (without giving the dates of the amendments,) while that sent to the clerk gave the date of the act and also the amendments, does not render the returns indefinite, uncertain, contradictory, or, in any sense, repugnant to each other, but they are regular and conformable to law. The difference is immaterial. *Id.*

4. County Canvassers cannot look beyond the inspectors' returns except to determine their genuineness as being signed by inspectors appointed or elected as such of the precinct. Ballots found in a ballot-box cannot be considered by the County Canvassers. *Id.*

5. Where the County Judge and Clerk have called in a Justice of the Peace, who acts with them in canvassing election returns, the justice becomes a member of the Board of County Canvassers, and is, like the other members, amenable to the writ of mandamus to control or correct their action. *Id.*

6. The statute authorizes the Board of State Canvassers to lay aside and not include in their canvass the county returns or papers purporting to be county returns when it appears to them that such returns are "so irregular, false or fraudulent" that the board cannot "determine the true vote" for any office, *i. e.* the vote actually cast. The law requires the County Canvassers to canvass the precinct returns received on the sixth day after election, whether the precinct returns from all the precincts are then in or not; and further requires the county board to certify the result of this canvass to the State Canvassers, to be included in the State canvass, unless they are shown or appear to be of the character above described. The returns from one county were shown to have been complete except that no return had been made to the county board of votes cast at one poll, and no vote from that poll was included in the county canvass and return to the State Board, and for this reason the State Board did not include the vote returned from that county, on the ground that it was so irregular or false that it did not show the "true vote;" upon this state of facts it was *held*: That the county return was in no wise so irregular or false, within the meaning of the law, that the State Canvassers could not determine the "true vote" from such return; that the county return being genuine, regularly and strictly legal in all respects, and required to be made for the purposes of the State canvass, and included only votes actually cast, it could not be condemned as "false," but was a return expressly required by law to be counted. [WESTCOTT, J., Dissenting, thought the return from Madison county was "false" within the

ELECTION AND ELECTION RETURNS—(*Continued.*)
meaning of the statute.] *State, ex rel.,* vs. *Board State Canvassers,* 29.

7. A certificate signed by a majority of a board of precinct inspectors of election, showing the vote cast at such precinct, is a valid return of the election, and the omission or refusal of one of three acting inspectors, who refused to join the other two inspectors in signing the return, is not an irregularity in the return. *Id.*

8. The omission to send to the clerk's office the oaths of inspectors of election or the poll-lists is a violation of duty on the part of inspectors, but does not invalidate a return of the votes cast at the precinct. *Id.*

9. The law directing the precinct inspectors to seal their return of the votes cast before forwarding it to the clerk is directory only and does not vitiate the return. Id.

10. The certificate of inspectors of an election to a fact not required by law to be certified by them, cannot be received by the County Canvassers to invalidate a regular return. *Id.*

11. Mere irregularties in the conducting of an election, or in making returns to the County Board of Canvassers, will not authorize the State Board of Canvassers to exclude the county return from the State canvass. Id.

12. A Board of County Commissioners have no power to control the registration of voters by the clerk of the court, and have no pwer to place names upon the registration lists, except while the lists are before them for revision, to restore names improperly or inadvertently erased. *State, ex rel.,* vs. *Commissioners of Jefferson County,* 707.

13. The existence of circumstances indicating that members of the County Board do not intend to meet at a time, and for public purposes, as provided by law, will not authorize a mandamus before an actual omission of duty has occurred. *Id.*

14. Application to the County Commissioners for a certificate for the purpose of having a name restored to the registration list, by a person whose name has been improperly struck from the list, and the granting of such certificate, and presenting the same to the clerk, is not the exclusive method of procuring the re-enrollment of such name. Every person having the legal qualifications of an elector is entitled to have his name entered upon the registration list by the clerk upon taking the prescribed constitutional oath before the registration officer or clerk, even though his name has been improperly erased by the board. The clerk or registration officer has no judicial or other discretion to refuse registration when the oath is tendered. *Id.*

15. The wrongful or improper erasure or omission of the name of a

ELECTION AND ELECTION RETURNS—(*Continued.*)
person who has been registered as a voter will not deprive him of the right to vote. He is entitled to vote on taking the oath prescribed in the 16th section of the election law, as amended by section 7 of the act of 1877, in cases where his name does not appear on the list. If his right to vote is challenged, he must also take the oath required of persons challenged. *Id.*

16. The provision at the end of section 7 of the act of 1877, (amending section 16 of the act of 1868,) requiring the persons offering to vote to produce witnesses who are personally known to two members of the board of inspectors of election &c., creates a court with peculiar powers, unauthorized by the Constitution, and is void. *Id.*

ELECTORS. *See "Domicil," Election and Election Returns,* 12, 14, 15, 16.

EQUITY AND EQUITABLE JURISDICTION. See *Administrators and Executors,* 9; *Courts and Judges, (Circuit,)* 2. *Guardian and Ward; Homestead and Exemptions,* 4, 5, 6, 7, 9; *Infants,* 1; *Landlord and Tenant,* 1; *Lien,* 2; *Pleading, (Equity,); Practice, (in Circuit Court—Equity); Reformation of Written Instruments; Ships and Shipping,* 1; *Statute of Limitations,* 9; *Vendor and Purchaser,* 1, 5, 6, 7; *Wills.*

ERROR. See *Appellate Practice; Practice, (Circuit Court, Law,)* 9; *Writ of Error.*

ESTOPPEL.—See *City of Jacksonville,* 3; *Trusts and Trustees,* 1.

EVIDENCE AND WITNESSES. See *Administrators and Executors,* 18; *Appeals,* 3, 11, 13, 15, 19, 22; *Attachment,* 2; *Contract; Criminal Law,* 4, 5, 6, 7, 10; *Demurrer to Evidence; Forcible Entry and Unlawful Detainer; Fraud; Judgment,* 9; *Lands,* 2, 3; *Pleading, (Law,)* 5, 6; *Reformation of Written Instruments; Wills,* 2; *Statute of Limitations,* 1.

1. To prove that books offered in evidence are the books of a deceased party and are books of original entry, it is not sufficient for the administrator to swear that the books came to his hands as administrator as the books of original entry of his intestate, and that he believes the debt is due. In all such cases there must be proof of hand-writing. In case of the death of parties making entries, they are presumed to have been made when they bear date and it is presumed that the transaction was of that date. *Robinson* vs. *Dibble's Administrator,* 457.

2. Whether books of original entry are in such condition, on account of erasures, interlineations, and like causes, as to justify their being submitted to the jury, is a question for the Judge of the Circuit Court to determine. His action in this matter cannot be reviewed here. *Id.*

EVIDENCE AND WITNESSES—(*Continued.*)

3. The business habits of the deceased party or the deceased clerk making the entries in a book, if admissible at all as evidence, are matters which go to the jury. They are matters affecting the "credibility of such evidence" within the meaning of the statute. Id.

4. Chapter 1983 of the Laws of Florida, being an act in relation to testimony in civil actions, prohibits a party from being a witness in chief as to any transaction between himself and the deceased person. The purpose of this act was to enlarge, not to restrict the competency of parties as witnesses. Its effect is to prohibit a party being a witness in chief as to such transaction, but the party may still make his suppletory oath as to his books of account, his cross-examination being restricted to the matter of such oath. He cannot be a witness in chief in the cause as to such transaction. *Id.*

5. An objection to the competency of a witness whose deposition is offered in evidence, may be made at the time it is offered; and such objection is not waived by an objection made only to the time and manner of taking the deposition, at the time of receiving notice of the taking. *Walls* vs. *Endel, et als.*, 478.

6. Courts are entrusted with a discretion in regard to the order of the introduction of evidence and the examination of witnesses, and this discretion should be exercised in furtherance of justice. *Burroughs* vs. *State*, 643.

7. It is not error when, in the exercise of a sound discretion, the court permits the party to introduce a new witness after the evidence is closed on both sides, unless such witness has been kept back by trick, or the opposite party had been deceived or injuriously affected by it. *Id.*

8. A defendant is asked if he knew of his own knowledge certain matters in issue in the suit otherwise than by personal communition or conversation with the deceased person whose administratrix is the plaintiff: *Held*, That the question was not an improper one under Chapter 1983, Laws. *Raulerson* vs. *Rockner's Administratrix*, 809.

9. In an action by one executor against his co-executor to recover a share of money allowed to the executors in gross, as compensation for administering an estate, which money was alleged to have been received and retained by the defendant, the question to plaintiff as a witness in his own behalf on the trial, whether the plaintiff was always "willing, anxious and ready" to perform duties as an executor, is not a material question, the statute giving compensation for responsibility assumed and for services performed. *Bellamy* vs. *Hawkins*, 750.

EVIDENCE AND WITNESSES—(*Continued.*)

10. Where a witness has already testified to certain facts, it is not error to refuse to hear the same facts repeated by the same witness, upon the same direct examination. *Id.*

11. A certificate by the custodian of a record or document, stating that the annexed copy is an "extract" from the original, it will not be received in evidence if objected to. *Id.*

12. A certificate that the "extracts" from a record contain all of the original that affects the matter in controversy, is not evidence that the omitted parts are not material, this being a question for the court, and not for the certifying officer, to determine, from an inspection of the entire document. *Id.*

13. Oral testimony of the Judge of Probate as to the contents of a record or paper in his office cannot be received to prove the contents of the writing, the original being in existence and accessible. *Id.*

14. Oral testimony of the admissions of a party as to the existence, the amount or effect of a judgment or decree, cannot be received for the purpose of showing the existence of the judgment, or its legal purport, the record being accessible. *Id.*

15. Oral or written testimony to the admission or declarations of an executor, that he has received a certain sum of money as compensation and commissions for administering an estate, are not evidence in behalf of a co-executor who sues him for a share of such money, without showing by the judgment, order or decree of the court, that the claimant is legally entitled to a portion of the money so received. *Id.*

16. Under the statutes of this State an administrator asserting his own claim against the estate in the master's office stands in the relation of any other creditor, so far as testifying to transactions and communications had by him with the deceased in reference to his own debt is concerned. He is disqualified except as to matters to which the distributee is examined on his own behalf. As to the claim of any other creditor against the estate, he is a competent witness to transactions and communications with the deceased intestate. *Sanderson's Administrators* vs. *Sanderson,* 820.

17. The defendant in a criminal case, having caused his witnesses to be duly and properly subpoenaed to appear at the trial is entitled under the statute upon a proper case being made to an attachment to compel their attendance as such witnesses; and it is error to compel such defendant to go to trial in such case without first having issued such process and used reasonable means to procure their attendance. *Green* vs. *State,* 669.

18. Where a deed purporting to have been executed under a power of a public and statutory nature is sought to be used in evidence,

EVIDENCE AND WITNESSES—(*Continued.*)
the power should be shown, and where the power is the order of a court of special and limited jurisdiction, and the record of the order or decree is presented, the question whether the deed was void for want of jurisdiction in the court to make the order or decree is a question of law for the court, and not for the jury. Where, however, the opposite party, upon the introduction of the deed without the power, makes no objection, introduces subsequently the record of the order of the court, fails to ask the court to pass upon the sufficiency of the deed, relies upon instructions of the court covering the subject-matter given at his request, and leaves the entire question to the jury, he cannot object to this action for the first time in an Appellate Court. The question here upon such an appeal is whether, upon the evidence, the finding of the jury was erroneous. *Emerson* vs. *Ross' Executrix, et als,* 122.

19. Where it is necessary for a party to establish a *prima facie* title to lands in order to maintain a suit to prevent or remove a cloud upon the title, and he shows that his grantor purchased at an administrator's sale in 1863, and, in connection with the administrator's deed, shows a decree of the Probate Court ordering the sale, upon petition for such sale for the purpose of distribution and payment of debts, a citation to persons interested in the estate will be presumed until the contrary is shown, especially where it appears that the heirs acquiesced in and ratified the sale at the time, and the purchaser and his grantee has had the undisturbed possession under such sale and deed for ten years. *Wilson* vs. *Matheson,* 630.

20. In common law actions the evidence taken upon the trial is no part of the record unless made so by bill of exceptions. In chancery causes all of the evidence taken is a part of the record without the formality of a bill of exceptions. Hence, in common law cases, in the absence of a bill of exceptions, action of the Circuit Court, taken with reference to facts which should appear by bill of exceptions, is presumed to have been justified by the evidence. In chancery causes, the presumption being that the record, as certified, contains all of the evidence, the action of the Circuit Court, based upon the evidence in the record, is to be examined with reference to the record, and the record is to be taken as containing all the evidence material in the cause. In equity causes any omission must be supplied by *certiorari,* which may issue at the instance of the appellee under the rules, or by the court in cases where it is satisfied that what is omitted is material in the consideration of the case. *Hyer's Executors* vs. *Caro's Executrix,* 332.

EXCEPTIONS. See *Appeals*, 4, 5, 6, 11, 18, 21; *Bill of Exceptions; Charge of Judge to Jury*, 4, 5, 6, 10, 12, 16, 18.

It is not necessary to except to a judgment upon demurrer for the purpose of reviewing the same on error. *Hinto* vs. *Simpson & Co.*, 444.

EXECUTIONS. See *Administrators and Executors*, 7; *Homestead and Exemptions*, 4, 6, 7; *Judgment*, 8, 11.

1. An affidavit that a judgment, upon which an execution was issued, had been satisfied and discharged before the issuing of the execution, is a sufficient statement that the execution was "issued illegally," within the meaning of the statute. (Thomp. Dig., 360.) *Mathews vs. Hillyer*, 498.

2. Where a defendant in execution made an affidavit that the judgment was satisfied and discharged by a certain transaction between himself and the plaintiff before the execution issued, and executed the bond required by statute, which was returned into court with the execution by the sheriff, it becomes the duty of the court to hear the proofs of the parties as to the facts stated and "determine thereon:" and it is error to dismiss such affidavit upon motion, (the grounds of which motion are that the same matter has been already adjudicated,) and without evidence being produced or facts admitted by either party, and opportunity given to the parties to be heard thereon. *Id.*

3. If a defendant in execution is shown to be the landlord of the person in possession at the date of the sale under the execution, the purchaser at the sale acquires his right, and upon the expiration of the term of the tenant he, the purchaser, can recover the possession of such tenant although the legal title be shown to be in a person other than the tenant. *Donald et als.*, vs. *McKinnon*, 746.

EXECUTIVE DEPARTMENT. See *Constitutional Law*, 1, 2, 3, 4, 5.

EXPRESS COMPANIES. See *Common Carriers*..

FALSE SWEARING, WILFUL AND CORRUPT. See *Criminal Law*, 16.

FALSE PRETENCES, OBTAINING GOODS UNDER. See *Criminal Law*, 10, 11.

FIERI FACIAS. See *Executions*.

FILES OF COURT. See *Appeals*, 3; *Practice (in Supreme Court.)*

FORFEITURES. See *Wills*, 3. 4.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

Title deeds cannot be received in proceedings under the forcible entry and unlawful detainer act for the purpose of basing a right of action or defense upon the title, except when the possession of a part is shown, for the purpose of showing the boundaries or the

FORCIBLE ENTRY AND UNLAWFUL DETAINER—(*Continued.*)
extent of the possession claimed. No question of title can be entertained, and it is not competent for the jury, in such proceedings, to determine whether certain papers constitute a deed or a mortgage. *Walls vs. Endel, et als,* 478.

FRAUD. See *Principal and Surety,* 4; *Bastardy,* 1; *Attachment.*

Fraud cannot be inferred from evidence consistent with simple error or mistake of fact in representations made by one party to another. *Sanford* vs. *Cloud,* 557.

FRAUDULENT CONVEYANCES. See *Pleading,* (*Equity,*) 3.

GARNISHMENT.

1. A garnishee must not only have actual possession of defendants' property, but there must be, except in cases of fraudulent dispositions, privity, express or implied, of contract and interest between the garnishee and the defendant, by which the defendant would have a right of action, or an equitable claim against the garnishee to recover the property for his own use, either at the present or some future time. *Huot, Kelly & Co.,* vs. *Ely, Candee & Wilder,* 775.

2. The maker of a negotiable note should not be charged as garnishee of the payee while such note is current, unless it appears that the garnishee has it in his own possession and under his own control. *Id.*

GOVERNOR. See *Constitutional Law,* 1, 2, 3, 4, 5.

GRAND JURY. See *Criminal Law,* 12, 23, 24; *Jurors and Jury,* 3, 6, 7, 8.

GUARDIAN AND WARD. See *Pleading,* (*Equity,*) 11; *Practice,* (*Circuit Court, Equity,*) 1.

1. A ward after arriving at his majority may call his guardian to an account in a court of equity. In such suit the sureties upon the guardian's bond may be made defendants with the guardian. *Pfeiffer and Sullivan vs. Knapp.* 144.

2. Where, after the giving of bond, the guardian, to discharge a debt due by him in his private capacity to the executor of the will of the ancestor of the ward, receipts to the executor for the whole or a part of the distributive share of the estate coming to the ward, but there is no actual receipt and transfer of the money, the executor simply crediting himself with the amount as so much paid to the guardian on account of the ward, the guardian is chargeable with such sum in his accounts with the ward, and the sureties upon the bond are liable therefore in case of his failure to perform his trust in accordance with its conditions. *Id.*

HABEAS CORPUS. See Bastardy, 3.

HOMESTEAD AND EXEMPTIONS.

1. The constitutional provision relating to the exemption of a homestead to the head of a family residing in this State, providing that this "exemption shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption," is operative to secure to the heirs the benefit of the homestead exemption, notwithstanding the deceased head of the family had not resorted to the statutory method of defining and placing on record the description of the property he intended should constitute his homestead. *Baker* vs. *State*, 406.

2. The heirs of the deceased owner of land which was the homestead of himself and family, have the same right to claim and have set off to them as exempt from sale for the payment of debts the dwelling place and the quantity of land limited by the constitutional provision which was enjoyed by the ancestor as a home of himself and family in his life time. The constitutional provision is for the benefit of the family. *Id.*

3. The homestead, whether defined and recorded under the statute, or set apart to the heirs after the death of the head of a family, is not assets in the hands of an executor or administrator. *Id.*

4. The court of chancery has no jurisdiction of a bill to enjoin a defendant in execution from selecting and making a *claim* of exemption of personal property levied upon by the sheriff. The right of possession involved can only be tested in a court of law. *Phillips* vs. *Crichton, et als.*, 600.

5. An act of the Legislature making the sale of exempt personal property a felony, though it may operate to produce timidity on the part of the sheriff and cause him to decline to sell property claimed to be exempt, does not operate to invest a court of equity with a jurisdiction to inquire into the right to levy and sell. *Id.*

6. A court of equity has no jurisdiction of a bill filed to enjoin parties and sheriff from proceeding to appraise and claim the exemption of personal property, levied upon by *fi fa.*, even though it be alleged that the judgment and execution are for the purchase money of the property. *Christopher* vs. *Bowden, et al.*, 603.

7. The appraisement and selection of personal property, claimed to be exempt from levy and sale, do not determine whether the property is lawfully exempt. That question is for a court of law to determine. *Id.*.

8. T. conveyed to P. certain land in Florida, and P. conveyed to T. land in Georgia, with full covenants, for the consideration of the Florida land. The title of the Georgia land failed by reason of prior incumbrances, and T. sued and recovered against P. on the cove-

HOMESTEAD AND EXEMPTIONS—(*Continued.*)
nants a judgment for the value of the consideration, P. having asserted his right to claim as exempt from sale a homestead upon the land: *Held*, That the covenant in P's deed is an "obligation contracted for the purchase of said premises" upon which the homestead is claimed, within the meaning of the Constitution, and the homestead right is subject to the payment of the money recovered for the breach of the covenant. *Porter et al., vs. Teate*, 813.

9. A married woman is not a necessary party to a suit to enforce an equitable lien arising out of an obligation contracted for the purchase of property claimed to be exempt as the homestead of the family, there being no right of homstead as against such lien. *Id.*

HOUSE OF ILL FAME. See *Criminal Law*, 3, 4, 5.

HUSBAND AND WIFE. See *Administrators and Executors*, 9; *Child's Part; Divorce; Dower, Marriage, Widow.*

IMPRISONMENT FOR DEBT. See *Bastardy*, 1.

INDICTMENT. See *Criminal Law*, 6, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28; *Information; Jurors and Jury*, 3, 6, 7, 8.

INFAMOUS CRIMES. See *Constitutional Law*, 6. 7.

INFANTS.

Under the statute of this State, as well as under the general rules of chancery practice, a suit in chancery by an infant is brought in *her own name* through her next friend. A suit by one "as guardian" of the infant does not bind the infant, she being no party. *Sanderson's Administrators vs. Sanderson*, 820.

INFORMATIONS. See *Constitutional Law*, 6; *Criminal Law*, 2, 3, 4, 6.

INJUNCTION—
OF JUDGMENT. See *Judgment*, 1, 2, 11.
OF SUIT AT LAW. See *Mortgage*, 1, 2, 3, 4.

JUDGMENT. See *Administrators and Executors*, 4, 7, 20; *Appeals*, 4, 15, 17, 18, 22; *Exceptions*, 1; *Practice*, (*in Circuit Court, Law,*) 3, 4.

11. Where a judgment in a suit against an alleged firm has been rendered against a person who is not a partner, and who was not served with process, a court of equity will perpetually enjoin proceedings under the judgment. *Purviance vs. Edwards*, 140.

2. Where a defendant interposes no defence, relying upon the assurance of the plaintiff's attorney that he will not take judgment against him or hold him in any way responsible, and the plaintiff,

JUDGEMENT—(*Continued.*)
contrary to this written promise and assurance, does take a judgment, a court of equity will enjoin its execution. *Id.*

8. The clerk, in ascertaining the amount which the plaintiff is entitled to recover in an action upon an open account, must act upon proofs produced and filed upon entry of the default, and the record must disclose this fact. Snell vs. Irvine and Densler, 234.

4. On the rule day, being the return day of summons in assumpsit, the clerk made the following entry: "There being no appearance, plea, or answer, on motion of plaintiff's attorney judgment is given by default in the sum of $202.68, principal and interest;" *held,* that this is not a final judgment but only a default. *Coons* vs. *Harlee,* 484.

5. In case of a default in an action upon a promissory note, for want of appearance, demurrer, or plea, the clerk may, after entering the default, upon production by the plaintiff of the note and filing it, assess the amount due upon it and then enter final judgment in favor of the plaintiff and against the defendant for the amount; and the facts of the production and filing of the note and the assessment of the amount due, should appear in the record, to authorize the entry of final judgment, and to show the basis of the judgment. (Sections 6 and 7, chapter 1938, Laws 1873.) *Id.*

6. Where a suit had been commenced against an administratrix, and judgment by default entered, and an assessment of damages made in 1863, but no judgment entered for ten years, and in the meantime the administratrix had sold the real estate, and afterwards, in 1873, the final judgment was entered in the original minutes of 1863, thus showing an apparent judgment lien as of 1863; *Held,* that the judgment so entered did not create a lien as against a *bona fide* purchaser, and an attempt to sell the land upon execution under such judgment might be enjoined by such purchaser. *Wilson, et al.,* vs. *Mathesony* 630.

7. A judgment by default and assessment of damages entered, but no final judgment, does not create a lien against the lands of the defendant. *Id.*

8. A judgment is not "goods or chattels," liable to levy and sale upon execution. Such a sale carries no right to control the judgment so sold, and is void. *Id.*

9. A simple transcript of a judgment entry does not prove a judgment in a collateral proceeding. Enough should appear to show jurisdiction. *Donald, et al.,* vs. *McKinnon,* 746.

10. This memorandum indorsed upon motion papers, upon a motion in arrest of judgment: "Motion granted," and signed by the judge, is not a final judgment from which an appeal can be taken, but is at most an order that an entry be made in the record of judgment, in

JUDGMENT—(*Continued.*)
due form, to the effect that judgment upon the verdict, etc., be stayed, that plaintiff take nothing by his declaration, etc., and for costs, if costs are adjudged. (Proper forms in such case given.) *Sedgwick* vs. *Dawkins*, 811.

11. The Constitution of 1868 gave the County Courts jurisdiction in civil actions where the amount in controversy did not exceed $300. Where a note sued on was for $300 and interest, and not reduced to the sum of $300 or less by proper credits or payments, but the whole amount due was claimed, and judgment entered therefor, such judgment is void for want of jurisdiction, and its execution is properly enjoined. *Wilson, et al.*, vs. *Sparkman*, 871.

12. An order authorized by statute to be made at chambers for the re-establishment of documents destroyed, if made in open court in term time, may be vacated or modified by the court in the same term, the court having entire control of its records and judgments during the term. *Hart's Executor* vs. *Smith*, 767.

13. An irregularity in proceedings before the court, not involving jurisdiction, may be waived by subsequent proceedings of parties, who, knowing the irregularity, act (e. g. under an order irregularly obtained) without making objection or excepting. *Id.*

JUDGES. See *Courts.*

JUDICIAL SALES. See *Courts and Judges, (Probate,)* 1, 2; *Executions,* 3; *Judgment,* 8; *Landlord and Tenant,* 1, 2; *Mandamus,* 10.

JURISDICTION. See *Constitutional Law,* 1, 2, 3, 4, 5; *Judgment,* 12; 13; *Mandamus,* 1, 4; *Representative in Congress; Executive Department.*

I. OF COURTS.

(1.) Concurrent Jurisdiction. See *Courts and Judges, (Circuit,)* 3.
(2.) County and Probate Courts.
Common Law Jurisdiction. See *Judgments,* 11.
Probate Jurisdiction. See *Administrators and Executors,* 1, 2, 4, 20; *Appeals,* 4; *Courts and Judges, (Probate, &c.,)* 1, 2, 3; *(Circuit,)* 3; *Evidence,* 19.
(3.) Circuit Courts. See *Courts and Judges, (Circuit)* 2, 3; *Change of Venue,* 5, 6, 7; *Judgment,* 12, 13.
(4.) Supreme Courts. See *Courts and Judges, (Supreme,)* 1, 2; *Mandamus,* 1, 4; *Prohibition,* 2.

II. EQUITY AND JURISDICTION. See *Equity and Equity Jurisdiction.*

III. SPECIAL AND LIMITED. See *Appeals,* 3; *Administrators and Executors,* 1, 4, 20; *Change of Venue,* 4, 5, 6, 7; *Evidence,* 18, 19; *Courts and Judges, (Probate,)* 1, 2.

JURORS AND JURY. See *Appeals*, 3; *Change of Venue*, 6; *Charge of Judge to Jury*.

1. Three of the jurors at a restaurant, where the bailiff had conducted them for the purpose of getting refreshments, passed into an adjoining cook-room, leaving the body of the jury in the eating room, but being within view of the bailiff; *Held*, not to be such a separation as would invalidate the verdict. *Coleman* vs. *State*, 206.

2. Chapter 3010, section 3, of the laws of this State, approved February 17, 1877, disqualifies the officers therein named from serving on either a grand or petit jury. It is not a privilege which the officer may avail himself of or not at his convenience. *Ladd* vs. *State*, 215.

3. An objection to the manner of drawing, summoning, or empaneling a grand jury, must be taken advantage of by plea in abatement to the indictment, and cannot be made the ground of a motion in arrest of judgment. *Burroughs* vs. *State*, 643.

4. If it appear upon a *voir dire* examination that a proposed "juror's conceptions are not fixed and settled, nor warped by prejudice, but are only such as would naturally spring from public rumor or newspaper report, and his mind is open to the impressions it may receive on the trial, so as to be convinced according to the law and the testimony, he is not incompetent." (O'Connor vs. The State, 9 Fla., 215.) *Montague* vs. *State*, 662.

5. Section 21, of chapter 1628, laws of 1868, does not contemplate the issuing of a special venire in order that the officer may summon bystanders to complete the panel of a jury exhausted by reason of challenges or otherwise. The requisite number may be summoned by the officer upon the order of the court then and there. It is not necessary for the officer to make a formal return of those summoned, as the whole proceedings are held in open court, and are embodied in its minutes. *Green* vs. *State*, 669.

6. Objections to the manner of summoning, empaneling, and the qualifications of grand jurors must be taken by plea in abatement, or motion to quash, before pleading to the indictment. *Potsdamer* vs. *State*, 895.

7. The record reciting that the grand jurors were called, empaneled and sworn, without giving the words of the oath, it will be presumed that the proper oath was administered. *Id.*

8. When the record shows that the members of the grand jury were duly sworn as such, and the caption of the indictment states that the jurors were "duly chosen, empaneled and sworn diligently to inquire, and true presentment make, in and for the body of the county," etc., "do present," etc., this is a sufficient statement that the presentment is *"upon their oath." Id.*

JURORS AND JURY—(*Continued.*)

9. The incompetency of petit jurors must affirmatively appear, otherwise a verdict will not be disturbed. The record showing that the jury was duly selected, empaneled and sworn, it is presumed they were "good and lawful men," until the contrary is shown. *Id.*

10. When in a capital case the record shows that the jury was "called, empaneled and sworn," it must be presumed that the requisite oath was administered unless the contrary be made to appear in the record. *Id.*

LANDS. See *Administrators and Executors*, 4, 5, 6, 9, 20; *Courts and Judges, (Probate,)* 1, 2; *Ejectment; Evidence*, 19; *Landlord and Tenant; Pleading, (Equity,)* 6, 7; *Statute of Limitations*, 4, 5, 6, 7, 8, 9; *Trespass; Trusts and Trustees*, 1; *Vendor and Purchaser.*

1. If a defendant in execution is shown to be the landlord of the person in possession at the date of the sale under the execution, the purchaser at the sale acquires his right, and upon the expiration of the term of the tenant he, the purchaser, can recover the possession of such tenant although the legal title be shown to be in a person other than the tenant. *Donald, et al.*, vs. *McKinnon*, 746.

2. In an action of trespass upon lands, it is not necessary for the plaintiff to prove his title or actual possession of the *locus in quo* where the possession of the plaintiff is admitted by the pleadings. *Tison* vs. *Broward*, 465.

3. Where the defendant, in an action of trespass upon lands, pleads not guilty, and that the land was the property of the defendant in fee simple, such plea admits the possession of the plaintiff, and the defendant must show his title in order to defeat a recovery. *Id.*

LANDLORD AND TENANT.

1. A landlord has no ground to maintain a bill in equity praying that personal property (crops), claimed by the tenant to be exempt from levy and sale, may be declared not to be so exempt, and that it be sold to satisfy rent and supplies furnished, there being no specific lien requiring the aid of a court of equity to enforce it, and no statute authorizing a proceeding in equity to determine the question of the exemption of personal property. The remedies at law are complete and adequate. *Haynes* vs. *McGeehee*, 159.

2. If a defendant in execution is shown to be the landlord of the person in possession at the date of the sale under the execution, the purchaser at the sale acquires his right, and upon the expiration of the term of the tenant he, the purchaser, can recover the possession of such tenant although the legal title be shown to be in a person

LANDLORD AND TENANT—(*Continued.*)
other than the tenant. *Donald, et al.*, vs. *McKinnon*, 746.

LARCENY. See *Criminal Law*, 9, 17.

LEGACY AND LEGATEE. See *Trusts and Trustees*, 5, 7, 8; *Wills*.

LIEN. See *Judgment*, 6, 7; *Mortgage*, 7, 11; *Vendor and Purchaser*, 1, 6.

I. OF MECHANICS AND MATERIAL MEN.

1. Under the statutes of 1868 and 1877, providing liens in behalf of mechanics, laborers, material-men and others for work and materials employed in erecting buildings, where a contractor employs the labor and furnishes the materials used in the erection of a building under an agreement with the owner to complete the same for a stipulated price, the extent of the liens is the amount due from the owner at the time of giving the notice of lien required by law. *Trustees of Wylly Academy* vs. *Sanford*, 162.

2. Where several liens are duly established under the acts of 1868 and 1877 by laborers and material men for labor and materials furnished to contractor in the erection of a building, and such aggregate liens amount to more than is due the contractor from the owner at the time of the service of notice to the owner that a lien is claimed under the statute, a court of equity, upon bill filed by the owner, may decree a discharge of the several liens upon payment into its registry of the amount actually due from the owner to the contractor at the time of such notice and the costs incurred in establishing the liens. *Id.*

MANDAMUS. See *Constitutional Law*, 1, 2, 3, 4, 5, 9, 10; *Elections and Election Returns*, 5, 13; *Schools*, 3, 10.

1. It is not a valid objection to the jurisdiction of State courts in mandamus proceedings, relating to the canvass of election returns, that the office affected is that of Representative in Congress. *State, ex rel.*, vs. *Board of County Canvassers*, 9.

2. A certificate showing in general terms a performance of the several specific acts commanded to be done by a peremptory mandamus is the proper response to such a writ. *Id.*

3. Peremptory writ of mandamus refused under circumstances showing that it would be certainly fruitless to the relator if issued. *State, ex rel.*, vs. *Inspectors of Election*, 26.

4. It is not good ground of demurrer to an alternative writ of mandamus directing a canvass of votes for Representative in Congress, that the relator does not show that he is qualified to take the office; the question of eligibility belonging exclusively to Congress to determine. *State, ex rel.*, vs. *Board of State Canvassers*, 29.

MANDAMUS—(*Continued.*)

5. It is not a good plea to an alternative writ of mandamus, directing a complete canvass of all the regular, unimpeached county returns, that a certificate of election had been issued to one declared elected upon a canvass in which certain county returns had been rejected which should have been counted, as the relator is entitled to demand a legal canvass of votes and duly returned, and a declaration of the result. *Id.*

6. In such a case the interest is common to all of the corporators, the duty is a public duty, the relief sought is not the enforcement or protection of a private right, and the corporators of the municipal organization have a right to a mandamus in the name of the State. *McConihe, et als.,* vs. *State, ex rel.,* 238.

7. It is no objection to awarding the writ that the time for the performance of the duty has passed, as it is only in case of default in performance at this time that a mandamus can issue. *Id.*

8. A writ of mandamus, to compel a Board of County Commissioners to meet and fully perform a public duty required by law, may be issued on the relation of a private citizen when the board has neglected or refused so to meet and perform as required by law. *State ex rel.* vs. *Commissioners Jefferson County,* 707.

9. But such writ cannot be demanded by one citizen in behalf of another, or a number of others, to compel a Board of County Commissioners to grant a certificate, or certificates, to which such others may be entitled under the registration law of 1877. Such individual right must be prosecuted by each person entitled to the individual relief. *Id.*

10. A writ of mandamus will not lie to compel a sheriff to levy on property the title to which is in the name of the wife of a defendant in execution, the plaintiff claiming that the property is in equity that of the defendant, and demanding of the sheriff that he levy upon it as the property of defendant. The plaintiff has other adequate remedies, both at law and in equity. *State ex rel.* vs. *Craft,* 722.

MARRIAGE. See *Divorce; Wills,* 3, 4.

1. "A marriage valid at common law is valid notwithstanding the statutes of the State where it is contracted prescribe directions respecting its formation and solemnization, unless they contain express words of nullity." *Daniel and Sams* vs. *Sams,* 487.

2. While there was a moral obligation which natural law imposed in the relation of husband and wife among slaves, still its legal consequences were regulated by the municipal law, and the issue of that relation, under that law, did not possess inheritable blood. The issue of a customary slave marriage, while not bastards, were yet not legitimate in the sense that they could inherit property by their ancestors after

MARRIAGE—(*Continued.*)
emancipation. This is the principle upon which the legislation of this State is based. *Id.*

3. A customary slave marriage of a free man of color and a slave woman, no other marriage or other legal impediment intervening, confirmed after emancipation of the woman by cohabitation as husband and wife, or by any other plainly established assent by both parties to the continued existence of the antecedent relation of husband and wife, renders the issue born in slavery legitimate. *Id.*

4. The cohabitation as husband and wife contemplated by the act entitled an act legalizing the marriage of persons of color, approved December 14, 1866, (Chapter 1552, Laws,) is not a cohabitation under a customary slave marriage before emancipation. This act, "an act in relation to escheats," approved December 12, 1866, (Chapter 1566, Laws,) and "an act to establish and enforce the marriage relation between persons of color," approved January 11, 1866, (Chapter 1469, Laws,) construed so far as applicable to this case. *Id.*

MASTER IN CHANCERY. See *Accounts.*

MARRIAGE AND DIVORCE. See *Divorce.*

MISNOMER. See *"Name."*

MORTGAGE. See *Bills of Exchange and Promissory Notes,* 2; *Pleading, (Equity,)* 8; *Practice, (Equity,)* 5; *Statute of Limitations,* 9.

1. One Robinson held the legal title to land as security for the payment of money borrowed by Matthews. Matthews borrowed of one Church money to pay Robinson, and Church took a note from Matthews and a deed from Robinson of the land as security for the money loaned to Matthews, and at the same time Church gave Matthews an agreement to convey to him, on payment of the money by a day certain, the agreement reciting that Church held the title as security for the payment of the money mentioned in the note. Afterwards Church assigned the note and conveyed the land to appellants by deed, reciting at length the agreement to convey to Matthews on such payment, and that appellants should perform the agreement: *Held,* that appellants held the land as a security for payment of the money, and that their claim upon the land was that of mortgagees holding the title in trust for Matthews until payment by him or until foreclosure. *Lindsay, et als.,* vs. *Matthews,* 575.

2. Upon payment or tender of the money due by the terms of the note and agreement after due, the court will entertain a bill by mortgagor to redeem the lands and compel a conveyance to him according to the terms of the agreement. *Id.*

MORTGAGE—(*Continued.*)

8. The fact that Matthews never had the title to the land does not affect his rights as the owner of an equitable interest; a conveyance, at Matthews' request, by the trustee holding the legal title for him, gives him the same standing in equity as though the conveyance or mortgage was made by him. *Id.*

4. In such case the court will enjoin a suit at law commenced by the holders of such legal title against the equitable owner to recover possession before foreclosure. *Id.*

5. A tender of money due will not operate to stop the accruing of interest unless such tender is absolute and unconditional; if the tender is accompanied by a demand of deed or release as a condition of the tender interest will continue to accrue. *Id.*

6. Rents and profits, to which a *cestui que trust* is entitled, out of property held by a trustee, are proper subjects of sale, assignment, or pledge to secure debts. *Wilson* vs. *Russ and Merritt*, 691.

7. A paper in the form of a mortgage which in terms conveys real estate to secure a debt, the mortgagor having no legal title but only a right to the rents and profits for life, creates no lien upon the realty, but is good as an assignment or pledge of the rents and profits. *Id.*

8. A trustee holding the legal title of land is a necessary party in a proceeding affecting the property or any interest therein; but when there is no trustee in being, at the commencemnt of suit, and a decree does not affect the title or the interest of a remainderman, the decree reaching only the net income of the property, a trustee may be appointed by the final decree, with proper directions as to the management of the property and the payment of the income. *Id.*

9. If a trustee so appointed refuse the trust, a receiver may be appointed to protect the interests of all parties interested in the estate. *Id.*

10. A decree of "foreclosure" and sale with directions to put a purchaser in possession of land, in a proceeding by an assignee or pledgee to subject the net income of the land to the payment of a debt for which such income is pledged, (the legal title and right of possession being, by the terms of the deed creating the trust, vested in a trustee,) is not a proper decree. A decree is such case should direct the trustee or receiver to secure the due protection and management of the property and the application of the net income to the payment of the debt for which the income is pledged. *Id.*

11. A mortgage, in this State, is a specific lien upon property, and is not, of itself, a conveyance of the legal title. The title is divested

MORTGAGE—(*Continued.*)
only by forfeiture of the conditions and a sale under the decree of the court. *McMahon* vs. *Russell*, 698.

12. The statute gives dower to the widow, "one-third part of the lands of which her husband died seized and possessed, or had before conveyed, whereof the widow had not relinquished her right of dower." R. and wife executed a mortgage to secure purchase money, and afterwards R., without his wife joining, executed another mortgage to secure a loan; *Held*, that the wife, by the first mortgage, relinquished her dower only as to this mortgagee and his assigns, and the money thereby secured, and was entitled to dower as against the second mortgage; and a foreclosure of the second mortgage and sale thereunder did not divest her of her dower rights. *Id.*

13. Where a husband had mortgaged land, his wife not joining or relinquishing her right of dower, and this mortgage was foreclosed, and the land sold and conveyed under the decree of the court, and the husband afterwards dies, such mortgage and sale as are a "conveyance" by the husband within the contemplation of the statute giving dower in lands "before conveyed, whereof the wife had not relinquished her right of dower." *Id.*

14. Where the husband and wife had executed a mortgage in which she had relinquished her right of dower, upon the death of the husband the widow cannot maintain a suit against the mortgagee or his assigns who may be in possession in pursuance of a sale under a second mortgage given by the husband alone, unless she redeems by paying the amount due upon the mortgage in which she had relinquished her dower. *Id.*

15. The purchaser under a second mortgage executed by the husband only, may pay off and take an assignment of a prior mortgage in which the wife had relinquished her dower, and hold the prior mortgage as a protection against a claim of dower until such prior mortgage shall be paid or the property redeemed therefrom. *Id.*

MULTIFARIOUSNESS. *Pleading, (Equity,)* 1, 2, 3, 10.

MUNICIPAL BONDS. See *City of Jacksonville*, 3.

MUNICIPAL POWERS AND PURPOSES. See *City of Jacksonville.*

MURDER. See *Criminal Law*, 27, 28; *Statute of Limitations*, 2.

NAME. See *Criminal Law*, 18.

An initial letter interposed between the christian and surname, is no part of the same. The law knows only of one christian name. *Burroughs* vs. *State*, 643.

NEGOTIABLE INSTRUMENTS. See *Bills of Exchange and Promissory Notes; City of Jacksonville*, 3.

NEW TRIALS.

1. A new trial will be granted where mere hearsay and immaterial evidence was permitted to go to the jury under objection, when the court can see that such evidence tended seriously to prejudice the case of the defendant. *Gallaher* vs. *State*, 370.

2. If the verdict of a jury in a criminal case is clearly against the law and the evidence, the court should grant a new trial, but if the indictment is fatally defective, judgment should be arrested after the verdict. *Snowden* vs. *State*, 386.

3. When the verdict of a jury is contrary to and against the law and instructions of the court, as applied to the clearly established facts in a case, it should be set aside. *Dennis* vs. *State*, 389.

4. In criminal cases, especially in felony, where the penalty is severe, the court will weigh the evidence, and where, in its opinion, it preponderates so strongly against the verdict that it cannot conclude such verdict was founded upon the evidence on the part of the State, no testimony having been introduced on the part of the defendant, a new trial will be granted. *Green* vs. *State*, 669.

5. When the verdict of the jury accords with the law and the facts of the case, a judgment will not be reversed on account of an erroneous charge to the jury, or a refusal to give instructions which may be appropriate, especially when a correct charge should produce the same result upon the facts. *May's Executors and Executrix* vs. *Seymour*, 725.

6. A new trial will not be granted on the alleged ground that the verdict is contrary to law and the evidence, there being evidence to support the verdict, however conflicting the testimony of witnesses of the respective parties, unless it seems that great injustice will result, or that the jury acted under improper influences. *Sherman* vs. *State*, 888.

7. An application to set aside a verdict and grant a new trial on the ground of newly-discovered testimony must be accompanied with some evidence that such testimony actually exists. *Id.*

8. This court cannot determine that the court below erred in denying a new trial upon certain specific grounds, unless the grounds are stated in the motion as made. *Potsdamer* vs. *State*, 895.

NON-CLAIM. See *Statute of Non-Claim.*

NOTICE. See *Administrators and Executors*, 5; *Vendor and Purchaser*, 6, 7.

OATHS. See *Administrators and Executors*, 3; *Pleading, (Law,)* 2.

OFFICER. See *Constitutional Law*, 1, 2, 3, 4, 5, 9, 10; *Mandamus; As to different Officers, see their respective heads.*

PAROL TESTIMONY. See *Evidence*, 13, 14, 15; *Wills*, 2.

PARTIES. See *Administrators and Executors*, 6, 7, 8; *Ejectment*, 1;

PARTIES—(*Continued.*)
Guardian and Ward, 1; *Homestead and Exemptions*, 9; *Infant; Mortgage*, 8; *Pleading*, 9.

PARTNERS AND PARTNERSHIP. See *Administrators and Executors*, 15, 17; *Attorneys at Law*, 1, 3, 4; *Judgment*, 1, 2; *Pleading*, (*Law,*) 20; *Practice*, (*Circuit Court, Law,*) 1; *Principal and Interest.*

1. A bill by distributees against administrators for mismanagement against one, and a general accounting against both, embracing in the demand a debt alleged to be due the estate by one of the administrators, arising from partnership relations existing between him and the intestate, is not multifarious. *Sanderson's Administrators* vs. *Sanderson*, 820.

2. That a person purporting to represent an infant distributee as general guardian in a bill against an administrator for account and distribution, is not such guardian, is not a proper subject matter for a cross bill; nor is a claim by an administrator against the estate as surviving partner of the deceased intestate a proper subject matter of the cross-bill when, in the original bill, the plaintiff prays a settlement of such account. The administrator in such case is an actor in the master's office. *Id.*

3. One of two partners, as attorneys at law, has no right, in the absence of a special contract or custom, to share in sums realized by the other as commissions for sales of stock in a railroad company; nor can he share in sums realized for services other than those which belong to their professional relations. Where he alleges that sum was realized by his co-partner for professional service, the burden of proof is upon him to establish it. *Id.*

PAYMENT. See *Administrators and Executors*, 16; *Guardian and Ward*, 2; *Statute of Limitations*, 13.

PERJURY. See *Criminal Law*, 16.

PETITION OF APPEAL. See "*Appeals*," 8, 21.

PLEA. See *Criminal Law*, 12, 23; *Pleading*, (*Law,*) 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 18, 20, 22; *Practice*, (*Circuit Court, Law,*) 7, 9.

PLEA IN ABATEMENT. See *Criminal Law*, 12, 18, 23, 24; *Jurors and Jury*, 3, 6.

POWERS. See *Appeals*, 4; *Evidence and Witnesses*, 18.

PLEADING—
I. COMMON LAW. See *Demurrer to Evidence; Ejectment*, 2; *Mandamus*, 4, 5; *Tenants in Common; Ships and Shipping*, 6; *Statute of Limitations*, 3, 4; *Vendor and Purchaser*, 2.

1. It is error to submit an issue upon one plea to the jury while other

PLEADING—(*Continued.*)
pleas remain undisposed of, when it appears that they were not abandoned. *Benbow* vs. *Marquis & Co.*, 441.

2. When a plea has been filed in due time but it is discovered that the officer before whom it was sworn to had omitted to sign the jurat, and the party makes affidavit that the plea was actually sworn to before it was filed and again swears to it before the court, it is not error for the court to refuse to strike off the plea as not sworn to. *Green* vs. *King*, 452.

3. It is not error for the court to allow a plaintiff only thirty minutes to add a similiter to a plea of not guilty in an action for a tort. *Id.*

4. Upon filing an amendment to a declaration with which declaration a bill of particulars was originally filed, it is in the discretion of the plaintiff to file new or additional particulars of his claim. His failure to do so is no ground for dismissal of the suit. Defendant's remedy in such case is found in the rule by which the parties are not allowed to give any evidence out of them. *Robinson* vs. *Dibble's Administrator*, 457.

5. In an action of trespass upon lands it is not necessary for the plaintiff to prove his title or actual possession of the *locus in quo* where the possession of the plaintiff is admitted by the pleadings. *Tison* vs. *Broward*, 465.

6. Where the defendant, in an action of trespass upon lands, pleads not guilty, and that the land was the property of the defendant in fee simple, such plea admits the possession of the plaintiff, and the defendant must show his title in order to defeat a recovery. *Id.*

7. Prolixity or superfluous statement of facts leading to a single conclusion of law does not necessarily render a plea demurrable for duplicity. *Sanderson's Administrators* vs. *Thomas and Livingston*, 468.

8. Under the plea of not guilty in ejectment, evidence to prove adverse possession is admissible and a special plea of the statute of limitations should not be allowed. Special demurrers being abolished in this State, such a plea when filed with the general issue should be struck out on motion or *sua sponte* by the court, as tending to embarrass the trial. *Wade, et al.*, vs. *Doyle*, 522.

9. Although a demurrer to a replication opens the pleadings and reaches back to the first error committed, yet it cannot be visited upon separate and distinct pleas on which issue has been taken. *Id.*

10. A bad replication is a good answer to a bad plea. *Id.*

11. Upon demurrer to replications to several pleas, if one of the pleas which reaches the merits of the suit is pronounced good, there should be final judgment for the defendant. The entry of a default for want

PLEADING—(*Continued.*)
of a replication to the plea after sustaining a demurrer to the replication, is not correct practice. *Id.*

12. After demurrer to pleas the court may in its discretion permit the pleas to be withdrawn. The order authorizing the withdrawal is entered on the minutes, but the pleas should not be removed from the files. *Id.*

13. The plea of "not guilty" is not applicable to an "action for damages" for breach of covenants, and the defendants should be permitted to withdraw it at all times if he so desires. *Sanford* vs. *Cloud,* 532.

14. To a plea setting up a want of title in the vendor at the time he entered into a contract of sale, it is a good replication that all the matters and things therein set up as a defence were before that time determined in favor of the plaintiff by a decree in a suit between the same parties, and the decree finds specifically that there was no bad faith, and there was a full and indispensable title in the vendor. *Id.*

15. That damages were not awarded, and that a decree cannot be enforced, is not a reply to a plea of *res judicata.* *Id.*

16. Amending a plea after it has been pronounced bad on demurrer is a waiver of the demurrer. *Id.*

17. The general rule is, that notwithstanding the particular pleading demurred to may be defective, the court will examine all the pleadings in the cause, and render judgment against the party chargeable with the earliest substantial fault in pleading. *Id.*

18. Where pleas plainly and clearly inconsistent with each other are filed, the court should require the party to elect his defense, and upon his election should strike out the inconsistent plea. The constitution requires all pleas to be sworn to. The court may properly exercsie its general power of control over the pleadings under the law to prevent inconsistent pleas. To the extent that this view is in conflict with the provisions of the act of November 23, 1828, regulating judicial proceedings, such act is repealed. *Id.*

19. If a party desires to have the ruling by the court upon the demurrer reversed he must not plead over, but take his appeal from the final judgment perfected upon the demurrer. *Mayo and Stokes* vs. *Keyser's Executrix,* 744.

20. In an action against two persons alleged to be partners, it is the right of each defendant to plead separately in his own behalf any defence available to him alone or both. *Friend* vs. *Duryee,* 111.

21. A suit against the maker and endorser of a promissory note cannot be maintained, there being no joint liability, their contracts being several and their liability depending on different contingences. *Webster* vs. *Barnett,* 272.

PLEADING—(*Continued.*)

22. It is not necessary that the vendor should have a complete, unincumbered title at the time he contracts. It will be sufficient if he will make a good title at the time he agreed to convey. The general allegation in a plea that vendor has not a good title is not sufficient. Vendee must state facts showing exactly where the deficiency is. It is the province of the court to determine what constitutes a good title, and present the question, the facts urged in denial of its existence must be stated by the pleader. *Sanford* vs. *Cloud*, 532.

II. EQUITY. See *Ships and Shipping*, 6.

1. A bill filed by the owner of the property against which several liens are established, in which the several lien creditors are made defendants, for the purpose of obtaining a discharge of the liens by payment into court of the amount due the contractor on his contract for buildings is not multifarious. *Trustees Wylly Academy* vs. *Sanford*, 162.

2. When at the hearing it appears that there is a joinder of equitable and legal causes of action against different defendants, also different claims against the same defendant by different plaintiffs, as well as different and distinct demands by different plaintiffs against different defendants united in the same bill, and there is no common interest centering in the point in issue in the cause, the court should *sua sponte* dismiss the bill at the cost of the plaintiffs. *Bauknight, et al.*, vs. *A. M. Sloan & Co., et als.*, 284.

3. Where the object of a suit is single and there is one general point in issue rendering the interest common to defendants, such as a suit to subject the property of an alleged fraudulent grantor, held in different parcels by different grantees, to the claims of his creditors, the objection of multifariousness will not prevail. *Id.*

4. Affirmative relief cannot be decreed in favor of a defendant, (except in matters of account,) upon the facts stated in the answer. And when it appears that the bill cannot prevail against a defendant on account of his superior right, it is the duty of the court to dismiss the bill as to him, unless he shall file a cross-bill setting forth his rights with a proper prayer for relief as against all other parties. *Wooten* vs. *Bellinger*, 289.

5. The defendant having consented to the filing of a supplemental bill and demurred thereto, cannot afterwards object on the ground of irregularity, such consent and pleading being a waiver of any irregularity in practice or pleading which might have been available. *Hyer's Executors* vs. *Caro's Executrix*, 332.

6. Upon a bill by a vendee in possession under an agreement to pur-

PLEADING—(*Continued.*)
chase seeking to set aside such contract of sale as a cloud upon his title otherwise acquired, the defendant vendor cannot have a decree for specific performance of the contract without cross-bill. *Sanford* vs. *Cloud*, 557.

7. Upon a bill seeking cancellation of an agreement of sale upon the ground of fraud, where the whole structure of the case is based upon a repudiation of the contract, and the prayer of the bill is of this character, it is not being proper to make any decree looking to the enforcement of the rights existing under the contract, this court should not declare such rights, but should direct the bill to be dismissed. *Id.*

8. Upon a bill by a mortgagor to redeem, there being no prayer for a sale of the lands, and no cross-bill, it is irregular decree a sale. *Lindsay, et als.*, vs. *Matthews*, 575.

9. A bill by a widow seeking account and distribution of her husband's estate, alleging that she is the widow and heir of her deceased husband, it being apparent on the face of the bill that there was issue of the marriage in being, is defective. She has, under the statute, a right to elect a child's part, but her claim is as widow making such election, and not as heir at law, and such must be her allegation. *Sanderson's Administrators* vs. *Sanderson*, 820.

10. A bill by distributees against administrators for mismanagement against one, and a general accounting against both, embracing in the demand a debt alleged to be due the estate by one of the administrators, arising from partnership relations existing between him and the intestate, is not multifarious. *Id.*

11. That a person purporting to represent an infant distributee as general guardian in a bill against an administrator for account and distribution, is not such guardian, is not a proper subject matter for a cross-bill; nor is a claim by an administrator against the estate as surviving partner of the deceased intestate a proper subject matter of a cross-bill when, in the original bill, the plaintiff prays a settlement of such account. The administrator in such case is an actor in the master's office. *Id.*

12. Amending a pleading after demurrer overruled is a waiver of the demurrer. *Browne* vs. *Browne*, 607.

13. Chapter 2004, Laws, which requires that the original mortgage or a certified copy of the same shall form a part of the bill of complaint, contemplates a copy certified by the officer authorized by law to make a certificate of the character named. *Id.*

III. CRIMINAL. See *Criminal Law*, 3, 10, 11, 13, 14, 15, 16, 19, 20, 21, 26; *Statute of Limitations*, 1.

PLEADING—(*Continued.*)

22. It is not necessary that the vendor should have a complete, unincumbered title at the time he contracts. It will be sufficient if he will make a good title at the time he agreed to convey. The general allegation in a plea that vendor has not a good title is not sufficient. Vendee must state facts showing exactly where the deficiency is. It is the province of the court to determine what constitutes a good title, and present the question, the facts urged in denial of its existence must be stated by the pleader. *Sanford* vs. *Cloud*, 532.

II. EQUITY. See *Ships and Shipping*, 6.

1. A bill filed by the owner of the property against which several liens are established, in which the several lien creditors are made defendants, for the purpose of obtaining a discharge of the liens by payment into court of the amount due the contractor on his contract for buildings is not multifarious. *Trustees Wylly Academy* vs. *Sanford*, 162.

2. When at the hearing it appears that there is a joinder of equitable and legal causes of action against different defendants, also different claims against the same defendant by different plaintiffs, as well as different and distinct demands by different plaintiffs against different defendants united in the same bill, and there is no common interest centering in the point in issue in the cause, the court should *sua sponte* dismiss the bill at the cost of the plaintiffs. *Bauknight, et al.*, vs. *A. M. Sloan & Co., et als.*, 284.

3. Where the object of a suit is single and there is one general point in issue rendering the interest common to defendants, such as a suit to subject the property of an alleged fraudulent grantor, held in different parcels by different grantees, to the claims of his creditors, the objection of multifariousness will not prevail. *Id.*

4. Affirmative relief cannot be decreed in favor of a defendant, (except in matters of account,) upon the facts stated in the answer. And when it appears that the bill cannot prevail against a defendant on account of his superior right, it is the duty of the court to dismiss the bill as to him, unless he shall file a cross-bill setting forth his rights with a proper prayer for relief as against all other parties. *Wooten* vs. *Bellinger*, 289.

5. The defendant having consented to the filing of a supplemental bill and demurred thereto, cannot afterwards object on the ground of irregularity, such consent and pleading being a waiver of any irregularity in practice or pleading which might have been available. *Hyer's Executors* vs. *Caro's Executrix*, 332.

6. Upon a bill by a vendee in possession under an agreement to pur-

PLEADING—(*Continued.*)
chase seeking to set aside such contract of sale as a cloud upon his title otherwise acquired, the defendant vendor cannot have a decree for specific performance of the contract without cross-bill. *Sanford* vs. *Cloud*, 557.

7. Upon a bill seeking cancellation of an agreement of sale upon the ground of fraud, where the whole structure of the case is based upon a repudiation of the contract, and the prayer of the bill is of this character, it is not being proper to make any decree looking to the enforcement of the rights existing under the contract, this court should not declare such rights, but should direct the bill to be dismissed. *Id.*

8. Upon a bill by a mortgagor to redeem, there being no prayer for a sale of the lands, and no cross-bill, it is irregular decree a sale. *Lindsay, et als.*, vs. *Matthews*, 575.

9. A bill by a widow seeking account and distribution of her husband's estate, alleging that she is the widow and heir of her deceased husband, it being apparent on the face of the bill that there was issue of the marriage in being, is defective. She has, under the statute, a right to elect a child's part, but her claim is as widow making such election, and not as heir at law, and such must be her allegation. *Sanderson's Administrators* vs. *Sanderson*, 820.

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PRACTICE—
I. In Supreme Court. See *Appellate Practice.*

The papers on file not being certified by the Clerk of the Circuit Court to be a copy of the record, the party placing them on file has leave to withdraw them. *Orange County High School* vs. *Sanford,* 120.

II. In Circuit Courts. See *Change of Venue; Judgment; Records and Records of Court.*
(1.) Law. See *Bill of Particulars; Pleading, (Law,)* 2, 3, 4, 11, 12, 13, 17, 19; *Judgment,* 3, 4, 5, 10, 12, 13; *Verdict.*

1. In an action against two persons alleged to be partners, it is the right of each defendant to plead separately in his own behalf any defence available to him alone or to both. *Friend* vs. *Duryee,* 111.

2. A suit against the maker and indorser of a promissory note cannot be maintained, there being no joint liability, their contracts being several and their liability depending upon different contingencies. *Webster* vs. *Barnett,* 272.

3. In case a judgment is entered in a joint suit against a maker and indorser without their consent, and this appears of record, it is error for which judgment will be reversed. *Id.*

4. It is not necessary to except to a judgment on demurrer for the purpose of reviewing the same on error. *Hinote* vs. *Simpson & Co.,* 444.

5. Whereupon an application for a continuance for the term, upon affidavit of the absence of a witness, the opposing party admits in writing all the facts expected to be proved by such witness, it is not error to refuse a continuance on account of such absence. *Green* vs. *King,* 452.

6. Where an affidavit for continuance does not show the materiality of the testimony of an absent witness, or that any effort has been made to obtain the attendance or the testimony, it is entirely insufficient, and the continuance is properly refused. The rule as to the sufficiency of an affidavit for a continuance for the term, is found in 9 Fla. Rep., 490, and in subsequent cases in 12th and 13th Fla. *Id.*

7. That a case is pending in a court of concurrent jurisdiction involving the same matters and seeking the same relief is not ground for continuance of a cause on motion of defendant where there are motions pending to strike out pleas which may and should be determined by the court, and where several continuances had before that time been granted at the instance of the party seeking such continuance. An affidavit for a continuance upon the ground of absence of a material witness must state explicitly and clearly the facts expected to be proved by the witness. *Sanford* vs. *Cloud,* 532.

PRACTICE—(*Continued.*)

8. In common law actions the evidence taken upon the trial is no part of the record unless made so by bill of exceptions. In chancery causes all of the evidence taken is a part of the record without the formality of a bill of exceptions. Hence, in common law cases, in the absence of a bill of exceptions, action of the Circuit Court, taken with reference to facts which should appear by bill of exceptions, is presumed to have been justified by the evidence. In chancery causes, the presumption being that the record, as certified, contains all of the evidence, the action of the Circuit Court, based upon the evidence in the record, is to be examined with reference to the record, and the record is to be taken as containing all the evidence material in the cause. In equity causes any omission must be supplied by *certiorari*, which may issue at the instance of the appellee under the rules, or by the court in cases where it is satisfied that what is omitted is material in the consideration of the case. *Hyer's Executors* vs. *Caro's Executrix*, 332.

9. It is error to submit an issue upon plea to the jury while other pleas remain undisposed of, when it appears that they were not abandoned. *Benbow* vs. *Marquis & Co.*, 441.

(2.) Equity.

1. Under the statute of this State, as well as under the general rules of chancery practice, a suit in chancery by an infant is brought in *her own name* through her next friend. A suit by one "as guardian" of the infant does not bind the infant, she being no party. *Sanderson's Administrators* vs. *Sanderson*, 820.

2. Upon remanding a cause to the Circuit Court, after the judgment of this court reversing its decree, it is not essential that the Circuit Court should enter a formal order setting its previous decree aside. *Merritt vs. Jenkins, et ux.*, 593.

3. A decree being reversed and a cause having been remanded, with directions to take an account between trustee and *cestui que trust*, the court, in making the order of reference, should do more than simply use the general language of the mandate of this court in its order. The chancellor should at least give directions that all just allowances and charges should be allowed the parties, and should declare the trust. *Id.*

4. Amending a pleading after demurrer overruled thereto, is a waiver of the demurrer. *Browne* vs. *Browne et als.*, 607.

5. Chapter 2004, Laws, which requires that the original mortgage or a certified copy of the same shall form a part of the bill of complaint, contemplates a copy certified by the officer authorized by law to make a certificate of the character named. *Id.*

6. Error in an interlocutory decree, in that it is too broad, granting

PRACTICE—(*Continued.*)
relief outside of the case made by the facts alleged in the original bill, is cured by the defendant consenting to the filing of a supplemental bill alleging the additional facts and making a corresponding prayer. *Hyer's Executors* vs. *Caro's Executrix*, 332.
(3.) Code. See *Appeals*, 12, 15, 16; *Judgment*, 10.
(4.) Criminal. See *Criminal Law*, 2, 8, 12, 18, 19, 21, 22, 23, 24, 27, 28, 29.

III. IN COUNTY OR PROBATE COURT.

See *Administrators and Executors*, 1, 2, 3, 4, 10, 20; *Courts and Judges*, (*Probate*,) 2.

PRESUMPTIONS. See *Administrators and Executors*, 16, 20; *Appeals*, 13; *Courts and Judges*, (*Probate*,) 2; *Evidence*, 19; *Statute of Limitations*, 13.

PRINCIPALS—FIRST AND SECOND DECREES. See *Criminal Law*, 19.

PRINCIPAL AND AGENTS. See *Ships and Shipping*, 2.

PRINCIPAL AND INTEREST. See *Administrators and Executors*, 11, 12, 15; *Mortgage*, 5; *Trust and Trustees*, 6, 7, 8.

Upon an accounting in the master's office between the distributee and the surviving partner of the intestate, on account of the partnership transactions, the surviving partner, who is administrator, is chargeable with only simple interest upon sums found due by him; also in like manner if the balance is found against the estate, it is charged with simple interest only. *Sanderson's Administrators* vs. *Sanderson*, 820.

PRINCIPAL AND SURETY. See *Guardian and Ward*, 1, 2.

1. Mere indulgence at the will of the creditor extended to the debtor, in no way discharges the obligation of a surety. There must be at least a valid common law agreement. *Pfeiffer* vs. *Sullivan and Knapp*, 144.

2. In an action upon a bond of a Revenue Collector to recover of a surety in the bond, money received as taxes upon the assessment roll in his hands, to which roll the assessor has neglected to annex a warrant directing the Collector to enforce the collection of taxes, the sureties are liable for the default of the Collector to pay over, according to law, the money so collected. *State* vs. *Rushing*, 226.

3. The want of a warrant only excuses the Collector from proceeding to enforce the collection by levy and sale of property, but taxes voluntarily paid to him must be accounted for as required by law, and his default in such case is included in the condition of the bond. *Id.*

PRINCIPAL AND SURETY—(*Continued.*)

4. Where a defalcation of a Collector of Taxes occurred under a previous term of office, though known to the officers of the State and not known to a surety of the Collector on his bond given on a subsequent appointment, the omission of the State officers to notify the surety that such previous default had occurred is not a fraud or a fraudulent concealment of the fact by the State or its officers, and constitutes no defence to the surety in an action upon his bond for a subsequent default. *Id.*

PRIORITIES. See *Administrators and Executors*, 5; *Vendor and Purchaser*, 6, 7.

PROBATE COURTS AND JUDGES. See *"Courts and Judges."*

PROHIBITION—WRIT OF.

1. A prohibition will not be granted to a Mayor's Court when it appears that the matter complained of has passed from the jurisdiction of that court by appeal to the Circuit Court. *Sherlock* vs. *Mayor, &c.*, 93.

2. A prohibition will only be granted by the Supreme Court to control the action of tribunals or persons exercising judicial power who attempt to usurp a jurisdiction belonging to some other forum. *Id.*

PROMISSORY NOTES. See *Bills of Exchange and Promissory Notes.*

PROSITUTION AND LEWDNESS—HOUSES KEPT FOR PURPOSES OF. See *Criminal Law*, 3, 4, 5.

PUBLIC SCHOOLS. See *"Schools."*

RAPE—ASSAULT WITH INTENT TO COMMIT. See *Criminal Law*, 19.

RECEIVER. See *Mortgage*, 9, 10.

RECORD OF CONVEYANCES. See *Administrators and Executors*, 5; *Vendor and Purchaser*, 7.

RECORDS AND RECORDS OF COURT. See *Appeals*, 1, 2, 6, 15, 24; *Change of Venue*, 4, 5, 6; *Evidence*, 11, 12, 13, 14, 15; *Judgment*, 12; *New Trial*, 8; *Re-establishment of Records.*

REDEMPTION. See *Mortgage*, 1, 4, 5, 14, 15.

RE-ESTABLISHMENT OF RECORDS. See *Administrators and Executors*, 7; *Judgment*, 12.

REFERENCE OF CAUSE TO JUDGE OF ANOTHER CIRCUIT. See *Change of Venue*, 4.

REFORMATION OF WRITTEN INSTRUMENTS.

If it is shown that an instrument of writing expresses something different from the real intent of the parties, equity will reform it so as to make it conform to such precise intent. The proof must be clear. *McRay, et als.*, vs. *McMinn*, 876.

RENT AND RENTS AND PROFITS. See *Administrators and Executors*, 6; *Landlord and Tenant*, 1; *Mortgage*, 6, 7, 8, 9, 10; *Vendor and Purchaser*, 1.

REPEALS.

OF CITY ORDINANCES. See *City of Jacksonville*, 2.

OF STATUTES. See *Pleading*, (*Law*,) 18; *Schools*, 1.

REPLICATION. See *Pleading*, (*Law*,) 10, 11, 14, 15.

REPRESENTATIVE IN CONGRESS. See *Mandamus*, 4.

It is not a valid objection to the jurisdiction of State courts in mandamus proceedings, relating to the canvass of election returns, that the office affected is that of Representative in Congress. *State, ex rel.*, vs. *Board of County Canvassers*, 9.

SALES. See *Judicial Sales*.

SCHOOLS.

1. Construing section 1, of chapter 2030, laws of 1874, relating to the mode of determining the amount of money necessary to be raised by tax for county school purposes, in connection with section 1, chapter 3100, laws of 1879, it is held that the latter does not repeal the former, and that it is the duty of the County Commissioners to order the levy of the sum ascertained by the Board of Public Instruction, and duly certified by them in the manner provided by law to be necessary, not to exceed two and a half mills on the dollar of the assessed valuation. *Jones* vs. *State, ex rel.*, 411.

2. The County Commissioners have no discretion to direct the collection by tax for school purposes of a less sum than that ascertained by the County Board of Public Instruction to be necessary for the support of the schools, if that sum is within the limit prescribed by law. The Board of Public Instruction are invested with the power to "ascertain and determine" the amount required. The act of 1879 authorizes the County Commissioners to *"ascertain* and *determine"* the amount necessary for general county purposes, and to *"levy"* the amount lawfully required for county school purposes as determined and certified by the officers authorized to ascertain it under the act of 1874. *Id.*

3. The Assessor cannot be required by mandamus to levy or compute the county school tax for the years 1879 and 1880, unless the same has been levied by the order of the County Commissioners. *Id.*

4. The "itemized estimate" of moneys required to be raised by county tax for school purposes, furnished by the Board of Public Instruction to the Board of County Commissioners, should contain not merely a statement of the whole amount of money necessary to be expended for the support of schools for the school year, but should

SCHOOLS—(*Continued.*)
also give the estimated income from the State school tax, State school fund and other probable sources, so that the County Commissioners may be informed of the amount required to be raised by county taxation. *State, ex rel., vs. Commissioners Gadsden County,* 418.

5. The Board of Instruction having failed to give an estimate of sources of revenue, it is competent for the County Commissioners to ascertain the necessary data in order to learn the proper amount required to be raised by tax. *Id.*

6. If the "itemized estimate" contains sums other than for the expenses of maintaining the schools, such items should be struck out by the County Commissioners. *Id.*

7. Sums of money for "salary of County Superintendent of Schools," and for compensation of the County Treasurer as "Treasurer of the Board of Public Instruction," are not proper items of the expenses of maintaining common schools to be included in the itemized estimate of school expenditures. *Id.*

8. The school board of the county has no authority to pay the compensation of the County Superintendent or the County Treasurer; they are county officers, to be paid as other county officers, and not to be paid out of the school funds or school taxes. *Id.*

9. Warrants outstanding, issued by the Board of Public Instruction during previous years, are receivable by law for school taxes levied by the County Commissioners; hence, in levying a sum necessary to be raised by tax, sufficient should be levied to liquidate such indebtedness so that the required amount shall be realized for maintaining the schools for the ensuing year. *Id.*

10. A return by the County Commissioners to an alternative writ of mandamus requiring them to levy a sufficient amount of county school tax, that they have levied a tax which they believe to be sufficient, is not a good return unless they make it appear that they have levied the amount shown by the itemized estimate of the Board of Public Instruction, with proper deductions and corrections, to be actually necessary for the support of schools for the year. *Id.*

SHERIFF. See *Execution,* 2; *Homestead and Exemption,* 4, 5, 6, 7; *Mandamus,* 10.

SHIPS AND SHIPPING.

1. A part owner of a ship cannot recover of another part owner in possession for negligence in the management of the common property which does not amount to a wrongful destruction of it, and the latter is not liable in a suit in equity to account to the former for earnings which might have been made by greater diligence, (e. g.,) by making a greater number of possible voyages, no express contract

SHIPS AND SHIPPING—(*Continued.*)
being violated. *Hyer's Executors* vs. *Caro's Executrix*, 332.

2. A part owner of a ship being in possession and control, and acting as master by virtue of his control as majority owner, is not such general or special agent of the minority owner as to create the specific liability which commonly attaches to the character of an agent in respect to the diligence due to an employer as between principal and agent. *Id.*

3. At common law, one tenant in common of a chattel had no method of dispossessing his co-tenant. All being equally entitled to possession, one in actual possession had a right to maintain it against the other, and was not liable, in the absence of an agreement, express or implied, imposing such liability for a want of industry and diligence in its use, nor could the tenant out of possession compel the tenant in posscsession to use or employ the chattel. *Id.*

4. The rule stated in the previous note did not, in some respects, apply to ships. The employment of a ship being a matter of public concern, a tenant in commen in possession was not permitted to let the ship remain idle against the wish of his co-tenant. As a means to enforce such employment, however, a part owner in possession was not held responsible in a court of common law or chancery to another part owner for a want of industry in the use of the ship. The means by which employment was secured were other than this, and the jurisdiction to enforce the right was to be found in a court of admirality. *Id.*

5. There are three kinds of possession of a chattel by a tenant in common: One in reference to title. Here the possession of one is possession of all, and such presumption is destroyed only by actual ouster or clear proof of adverse possession. Two, in reference to employment or use. First, a possession resulting from agreement between the parties, express or implied from circumstances. Here an actual use, although by one, is still a common employment for a common benefit, regulated by the contract. Second, a possession not referable to any contract or agreement between the parties—a possession by virtue of his right as part owner or co-tenant. *Id.*

6. Where any special liability to one tenant in common arises out of the possession and use of a ship by his co-tenant or part owner, under an agreement between them, express or implied, as to use, the co-tenant seeking damages for a violation of this agreement as co-tenant, must allege facts constituting such agreement or contract, and, in the event they are not admitted or are denied, must prove them. *Id.*

SLAVE MARRIAGES. See *Marriage.*

STATE.

The State is not required to give bond when she prosecutes a writ of error. The statutes authorizing the payment of costs by the Treasurer, upon the warrant of the Comptroller, regulate the liability of the State in this respect. *State* vs. *Rushing,* 223.

STATE PENITENTIARY. See *Criminal Law,* 29.

STATE PRISON. See *Criminal Law,* 29.

STATUTES. See *Pleading, (Law,)* 18; *Schools,* 1; *Repeals; Statutes Construed and Referred to.*

STATUTES CONSTRUED AND REFERRED TO.

ADMINISTRATORS AND EXECUTORS. See *Sub-title "Statute of Limitations," "Non-Claim."*

Administrator may sue in ejectment to recover real estate of intestate. Thompson's Digest, 188, (A. D. 1829); 202-3, (A. D. 1833); Chapter 1473, (A. D. 1866,) Section 2; Chapter 1732, (A. D. 1870,) Section 1; Chapter 3016, (A. D. 1877,) Section 1.

Sanches vs. *Hart,* 507.

COMPENSATION OF.

Thompson's Digest, (A. D. 1833,) 208.

Bellamy vs. *Hawkins,* 750.

DISTRIBUTION OF ESTATES.

Thompson Digest, 206, (A. D. 1828.)

Sanderson's Administrators vs. *Sanderson,* 820.

INVESTMENT BY AND RETURNS.

Thompson's Digest, 207, Chapter 1013, (A. D. 1859.)

Sanderson's Administrators vs. *Sanderson,* 820.

REMOVAL OF.

Chapter 1733, (A. D. 1870); Chapter 3003, (A. D. 1877.)

Sanderson's Administrators vs. *Sanderson,* 820.

APPEALS.

Dismissal of on failure to file record. Thompson's Digest 448-9 (A. D. 1832.)

Webster vs. *Barnett,* 119.

Orange County High School vs. *Sanford,* 120.

DISMISSAL ON FAILURE TO GIVE BOND IN THIRTY DAYS.

Chapter 3008, (approved 1877.)

Benhow vs. *Marquis & Co.,* 236.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

No Bond Reqired in Equity Cases Except for Supersedeas.
Thompson's Digest, 462, (A. D. 1832.)
Bauknight, et al., vs. *Sloan & Co., et als.*, 281.

Arrest of Judgment.
Thompson's Digest, 351, (A. D. 1828.)
Wade, et al., vs. *Doyle*, 522.

Attachment, Writs of.
Chapter 998, (approved A. D. 1859,) Section 1.
Meinhard, Brothers & Co., vs. *Lilienthal*, 501.

Bastard and Bastardy.

Thompson's Digest, 228, (A. D. 1828.)
Ex-parte, J. C. H., 362.

Bills of Exception.

Thompson's Digest, 351, (A. D. 1828.)
Webster vs. *Barnett*, 272.
Potsdamer vs. *State*, 895.

Boards of Public Instruction. See *Sub-title "Common Schools."*

Charge of Judge to Jury.

Chapters 138, 140, (A. D. 1848); 2096, (approved A. D. 1877.)
Coleman vs. *State*, 206.
Baker vs. *State*, 406.
Burroughs vs. *State*, 643.
Southern Express Company vs. *VanMeter*, 783.
Sherman vs. *State*, 888.
Potsdamer vs. *State*, 895.

Common Schools.

Chapter 1686, (approved 1869,) section 19, par. 15; chapter 1713, (approved 1869,) sections 30, 38, 42; chapter 1868, (approved 1871); chapter 1882, (approved 1872,) section 1, par 11; chapter 2030, (approved 1874,) section 1; chapter 2085, (approved 1877); chapter 3099, (approved 1879,) section 37; chapter 3100, (approved 1879,) section 1.
Jones vs. *State, ex rel.*, 411.
State, ex rel., vs. *Commissioners Gadsden County*, 418.

County or Probate Court. See *Sub-title Judges.*
Powers to Administrators and Executors. Chapter 1737. (A. D. 1870.)
Sanderson's Administrators vs. *Sanderson*, 820.

County Commissioners. See *Sub-title "Common Schools;" "Elections."*

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)
Chapter 1882, (A. D. 1872,) section 1, par. 11, chapter 3100, (A. D. 1879,) section 1.
Jones vs. *State, ex rel.*, 411.
State, ex rel., vs. *County Commissioners Gadsden County*, 418.

COUNTY TREASURER.

Chapter 2085, (approved 1877.)
State ex rel., vs. *Commissioners Gadsden County*, 418.

COURTS. See *Sub-title of "Judges," "Justices of Peace."*

CRIMES.

Animals—killing, disfiguring, &c. Chapter 1637, (A. D. 1868,) Sub-chapter 4, Sections 74, 79; Chapter 1846, (A. D. 1871.)
McGahagin vs. *State*, 665.

ASSAULT WITH INTENT TO COMMIT MURDER.

Chapter 1637, (A. D. 1868); Sub-Chapter 3, Section 46.
Sherman vs. *State*, 888.

ASSAULT WITH INTENT TO KILL.

Thompson's Digest, 490, (A. D. 1832); Chapter 1637, (A. D. 1868); Sub-Chapter 3, Sections 1, 34, 46.
Sherman vs. *State*, 888.

ASSAULT WITH INTENT TO MURDER.

Chapter 1637, (A. D. 1868); Sub-Chapter 3, Section 34.
Sherman vs. *State*, 888.

ASSAULT WITH INTENT TO ROB.

Chapter 1637, (A. D. 1868); Sub-Chapter 3, Section 46.
Green vs. *State*, 669.

FALSE SWEARING.

Chapter 1637; Sub-Chapter 6, Section 2; Sub-Chapter 12, Section 1, (approved 1868); Chapter 3021, Section 7, (approved 1877); Thompson's Digest, 80, (A. D. 1845.)
Humphreys vs. *State*, 381.
Dennis vs. *State*, 389.

HOUSE OF ILL FAME, *&c.*,—KEEPING.

Chapter 1637, (A. D. 1868); Sub-Chapter 8, Section 13.
King vs. *State*, 183.
Evans vs. *State*, 192.
McCoy vs. *State*, 193.

INFORMATIONS.
Chapter 2042, (A. D. 1877.)
King vs. *State*, 183.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

LIMITATIONS.
Thompson's Digest, 490, (A. D. 1832.)
Nelson vs. *State*, 195.

PLEADING. See *Sub-title Indictment.*

POLYGAMY.
Chapter 1637; Sub-Chapter 8, Section 4, 5.
Gallaher vs. *State*, 370.

PRINCIPALS IN THE SECOND DEGREE.
Chapter 1637, (A. D. 1868); Sub-Chapter 11, Section 3.
Montague vs. *State*, 632.

DEMURRERS—SPECIAL.
Chapter 1096, (A. D. 1861,) Section 15.
Wade, et al., vs. *Doyle*, 522.

DEMURRING AND PLEADING AT SAME TIME.
Chapter 1096, Section 34.
Green vs. *King*, 452.

DIVORCE.
Thompson's Digest, 223, (A. D. 1835.)
Crawford vs. *Crawford*, 180.

DOWER.

Thompson's Digest, (A. D. 1828,) 184-5.
McMahon vs. *Russell*, 698.

ELECTIONS AND ELECTION RETURNS.

Chapter 1625, (approved August 6, 1868); Chapter 1868, (approved February 27, 1872); Chapter 3021, (approved February 27, 1877.)
State, ex rel., vs. *Board of County Canvassers*, 9.
State, ex rel., vs. *Board of State Canvassers*, 29.
State, ex rel., vs. *Commissioners of Jefferson County*, 707.
State, ex rel., vs. *Inspectors of Election Madison County*, 26.
Humphreys vs. *State*, 381.

ESCHEATS. See *Sub-title "Marriages."*

EVIDENCE.

Books of account admissible in; chapter 662, (approved 1854.)
Robinson vs. *Dibble's Administrator*, 457.
Justice's docket as; chapter 2040, (A. D. 1875,) section 13; transactions, &c., with deceased persons, chapter 1983, (A. D. 1874.
Raulerson vs. *Rockner's Administratrix*, 809.
Sanderson's Administrators vs. *Sanderson*, 820.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

EXEMPTION OF PROPERTY FROM FORCED SALE.

Chapter 1715, (A. D. 1869,) section 9.
Haynes vs. *McGeehee, et ux.*, 159.
Chapter 1715, (A. D. 1869,) sections 7, 8; chapter 1944, (A. D. 1873.)
Phillips vs. *Critchton*, 600.

EXECUTION, ILLEGAL.

Thompson's Digest, 360, (approved 1834.)
Matthews vs. *Hillyer*, 498.

FORCIBLE ENTRY AND UNLAWFUL DETAINER.

Chapter 1630, (approved A. D. 1868,) section 20.
Walls vs. *Endel, et als.*, 478.

GRAND JURY.

When may indict for offence committed in another county; chapter 1637, (A. D. 1868,) sub-chapter 13, section 14.
Curry vs. State, 683.

INDICTMENTS.

Amendment of, specifications, &c., when vague and indefinite; chapter 1107, (A. D. 1861.)
Burroughs vs. *State*, 643.
McGahagin vs. *State*, 665.

DUPLICITY.

Chapter 1107.
Green vs. *State*, 669.

FINDING OF BY GRAND JUDGE OF COUNTY IN WHICH OFFENCE NOT COMMITTED.

Chapter 1637, (A. D. 1868,) sub-chapter 13, section 14.
Curry vs. *State*, 683.

INFANTS, HOW TO SUE.

Thompson's Digest, 326 (A. D. 1828.)
Sanderson's Administrators vs. *Sanderson*, 820.

JUDGMENTS AND DEFAULTS.

Chapter 1938, (A. D. 1873.)
Irvine and Densler vs. *Snell*, 234.
Coons vs. *Harllee*, 484.

JUDGES. See *Sub-title County or Probate Court.*

DISQUALIFICATION OF JUDGES OF SUPREME COURT.

Chapter 3120, (approved 1879.)
Conn vs. *Chadwick & Co.*, 428.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

TRIAL BY JUDGE OF ANOTHER CIRCUIT, (WITHOUT CHANGE OF VENUE.)

Chapter 351, (approved 1851.)
Bauknight, et al., vs. *Sloan & Co., et als.*, 281.
Johns' Executors vs. *Johns*, 806.

JURORS AND JURY. See *Sub-title Grand Jury.*

CHALLENGES.

Chapter 1628, (A. D. 1868,) Section 21, 26.
Ladd vs. *State*, 215.

DISQUALIFICATION CANNOT BE WAIVED BY JUROR.

Chapter 3010, Section 3, (approved A. D. 1877.)
Ladd vs. *State*, 215.

JUSTICE OF PEACE—DOCKET OF AS EVIDENCE.

Chapter 2040, (A. D. 1875,) Section 13.
Donald, et al., vs. *McKinnon*, 746.

LIEN—MECHANICS, LABORERS, ETC.

Chapter 1632, (approved 1868); Chapter 3042, (approved 1877.)
Trustee of the Wylly Academy vs. *Sanford*, 162.

MARRIAGES.

Thompson's Digest 219, (A. D. 1829); Chapter 1127, (A. D. 1861); Chapter 1469, (A. D. 1866); Chapter 1552, (A. D. 1866); Chapter 1556, (A. D. 1866.)
Daniel and Sams vs. *Sams*, 487.

MORTGAGES.

Chapter 525, (A. D. 1853); Chapter 2004, (A. D. 1874.)
Browne vs. *Browne, et als.*, 607.
McMahon vs. *Russell*, 698.

MUNICIPAL GOVERNMENT AND POWERS.

Chapter 1688, (A. D. 1869); Chapter 2024, (A. D. 1877); Chapter 3163, (A. D. 1879.)
Greeley vs. *City of Jacksonville, et al.*, 174.
McConihe, et als., vs. *State, ex rel.*, 238.

NON-CLAIM. See *Sub-title Statute of Limitations.*

PARTIES, MISJOINDER OF.

Chapter 1096, (A. D. 1861,) Section 8.
Webster vs. *Barnett*, 272.

PLEADING AND DEMURRING AT SAME TIME.

Chapter 1096, Section 34.
Green vs. *King*, 452.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

PLEAS, CONTRADICTORY.

Thompson's Digest 331, (A. D. 1828.)
Sanford vs. *Cloud*, 532.

RECORD OF CONVEYANCE OF REAL ESTATE.

Thompson's Digest, Section 4, Page 180.
Emerson vs. *Ross' Executrix*, 122.

RE-ESTABLISHMENT OF PAPERS, RECORDS, ETC.

Chapter 3019, (A. D. 1877.)
Hart's Executor vs. *Smith*, 767.

REVENUE AND TAXATION. See *Sub-title "Common Schools."*

Necessity for warrant for Collector to enforce collection; chapter 1976, (A. D. 1874.)
State vs. *Rushing*, 226.
Donald, et al., vs. *Mckinnon*, 746.

SALE OF LANDS OF TESTATOR OR INTESTATE BY PROBATE OR COUNTY COURT.

Thompson's Digest, pages 202-3, (A. D. 1833, '41); Chapter 1358, (A. D. 1862.)
Emerson vs. *Ross, et als.*, 122.
Wilson, et al., vs. *Matheson*, 630.

STATE "PENITENTIARY" OR "PRISON."

Chapter 1635, (A. D. 1868); chapter 1835, (A. D. 1871); chapter 3033, (A. D. 1877.)
Potsdamer vs. *State*, 895.

STATUTE OF LIMITATIONS.

I. *Civil.*

Thompson's Digest, 206-7, (A. D. 1828); chapter 142, (A. D. 1848); chapter 1271, (A. D. 1861); chapter 1867, (A. D. 1872.)
Sanderson's Administrators vs. *Thomas and Livingston*, 468.
Wade, et al, vs. *Doyle*, 522.
Sanford vs. *Cloud*, 557.
Browne vs. *Browne, et als.*, 607.
Sanderson's Administrators vs. *Sanderson*, 820.

II. *Criminal.*

Thompson's Digest, 490.
Nelson vs. *State*, 195.

STAYING PROCEEDINGS.

Thompson's Digest, 351, (A. D. 1828.)
Wade, et al., vs. *Doyle*, 522.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

STRIKING OUT PLEAS.

Chapter 1096, (A. D. 1861,) section 16.
Wade, et al., vs. *Doyle,* 522.
Thompson's Digest, 331, (A. D. 1828.)
Sanford vs. *Cloud,* 532.

SUPERINTENDENT OF COMMON SCHOOLS.

Chapter 1686, (A. D. 1869,) section 19, par. 12.
State, ex rel., vs. *County Commissioners Gadsden County,* 418.

TAXES. See *Sub-titles "Common Schools," "Revenue and Taxation."*

TERMS OF CIRCUIT COURT.

Chapter 3117, (approved 1877.)
Benbow vs. *Marquis & Co.,* 236.
Thompson's Digest, 322, (A. D. 1828); chapter 1561, (A. D. 1866.)
Bass vs. *State,* 685.

TREASURER OF COUNTY SCHOOL FUND.

Chapter 2085, (approved A. D. 1877.)
State, ex rel., vs. Board of County Commissioners, Gadsden County, 418.

VENUE, CHANGE OF.

Chapter 1637, (approved 1868); Sub-Chapter 13, Section 13; Thompson's Digest 333, 524, (A. D. 1828, 1845); Chapter 373, (approved 1851.)
McNealy and Roulhac vs. *State,* 198.
Bauknight, et al., vs. *Sloan & Co., et als.,* 281.
Johns' Executors vs. *Johns,* 806.

VERDICT.

Of less degree of the offence than is charged in the indictment. Chapter 1637; Sub-Chapter 13, Section 7.
Potsdamer vs. *State,* 895.

WITNESSES, ATTACHMENT FOR.
Thompson's Digest 334, (A. D. 1828.)
Green vs. *State,* 669.

WRIT OF ERROR.
State not required to give bond on prosecuting; Thompson's Digest 447, (A. D. 1836.)
State vs. *Rushing,* 223.

WRIT OF PROHIBITION.
Chapter 3002, (approved February 10, 1877.)
Sherlock vs. *City of Jacksonville,* 93.

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

"WRITING WHEREBY MONEY IS PROMISED OR SECURED TO BE PAID."

Thompson's Digest 348, (A. D. 1828.)
Bellas vs. *Keyser*, 100.

STATUTE OF FRAUDS.

Payment of the purchase price of land, upon a parol agreement to convey, no other act being done by either party under the agreement, is not enough to take the case out of the statute of frauds, and a court of equity cannot decree a specific performance. *Price* vs. *Price et ux.*, 605.

STATUTE OF LIMITATIONS. See *Criminal Law*, 7; *Pleading*, (*Law*,) 8.

1. The statute of limitations in respect to crimes is to be construed liberally in favor of defendants, and it is not necessary for a party relying upon it to plead it in bar. The offence must be proved to have been committed within the statutory limtation. *Nelson* vs. *State*, 195.

2. A conviction for murder in the third degree, although had on an indictment for murder, cannot be sustained where the offence was not prosecuted within the period fixed by the statute, towit: "Within two years next after the offence shall have been committed.' *Id.*

3. Cause of action on merchant's account accrued against intestate in January, 1868; intestate died in June, 1871, and letters of administration issued in November, 1871; suit commenced in August, 1876, plea of statute of limitations which was passed February 27, 1872; no allegation that claim had been presented, under the statute of non-claim, to the administrators; on demurrer to the plea; *Held*, That the plea was good. *Sanderson's Administrators* vs. *Thomas and Livingston*, 468.

4. In an action of ejectment, pleas under the statute of limitations simply denying the seizin or possession of the plaintiff, his grantor, ancestor, or precedessor, within seven years before the commencement of the action, or the accrual of the right of action, are bad. Upon proof of legal title, and an adverse possession should be set up by the pleas. *Wade, et al.*, vs. *Doyle*, 522.

5. The act of limitations of February 27, 1872, applied to all rights of action which had accrued in the past as well as to those which would accrue in the future. The case of Spencer vs. McBride, 14 Fla., 403, approved. *Id.*

6. The saving clause in the statute of 1872 only extends to the persons to whom the title first accrues, and when the statute has once

STATUTE OF LIMITATIONS—(*Continued.*)
begun to run, it will continue to run without being impeded by any subsequent disability, such as infancy and coverture. *Id.*

7. Under the statute of limitations, in force in this State from 1850 to December 13, 1861, seven years' possession by a defendant, and those under whom he holds, adverse to plaintiff, and those under whom he holds, no legal disability operating to suspend the statute being shown, vests a good possessory title in the defendant as against the plaintiff and his grantors. *Sanford* vs. *Cloud,* 557.

8. A claim under a patent issued by the United States at a time when there was no title in the United States, is a sufficient claim of title. In such cases, it is not necessary that there should be a rightful title or a good conveyance, nor is it necessary under the statute of limitations of 1848 that title should be claimed under a written contract. *Id.*

9. A suit in equity to sell land mortgaged, and to apply the proceeds thereof to the payment of a promissory note secured by the mortgage, is an action upon a contract founded upon an instrument of writing under seal within the meaning of the tenth section of chapter 1869, of the Laws of Florida, entitled "An act of Limitations in Civil Suits," approved February 27, 1872, and such suit can be maintained in equity, notwithstanding an action at law upon the note is barred. *Browne* vs. *Browne et als.,* 607.

10. An exhibition or presentation of a claim to the administrator within the limitation of one year from the issuing of his letters (section 15, chapter 1869, laws,) stops the running of the statute of non-claim, as well as the statute limiting the time for actions against an administrator. The creditor is not obliged to reduce his claim to judgment. What constitutes an exhibition within the meaning of the statute, considered and defined. *Sanderson's Administrators* vs. *Sanderson,* 820.

11. The general rule is that an administrator may or may not plead the general statute of limitations against a claim not barred in the lifetime of the intestate and otherwise justly due. This rule, however, is not applicable to statutes in terms limiting the time in which an action may be brought against him in his *representative capacity as administrator.* He should be charged with all the debts paid which were barred by such statutes. Section 15, of the act of February 27, 1872, chapter 1869, laws, is such a statute. The terms, "after the expiration of that time," in the section referred to, considered and explained. A majority of the court hold that where notice calling in claims under the statute of non-claim had been given anterior to the passage of the act prescribing the limitation of one year, the limitation of one year does not operate. *Id.*

STATUTE OF LIMITATIONS—(*Continued.*)
12. An administrator of a solvent estate has a right in this State to retain a debt due himself not barred in the lifetime of the intestate or at the date of the issuing of his letters. It is not necessary that he should file his claim with the Judge of Probate or present it to himself, to save the operation of the statute of limitations or the statute of non-claim. Upon final settlement he has a right to have his claim satisfied, if it is not of such a character as a presumption of payment will operate. *Id.*

13. Where the fair presumption and conclusion from the evidence is that an administrator, who was the surviving partner of the intestate, did not at the commencement of the suit know of the reception of moneys on partnership account by the deceased, and the lapse of time has not been sufficient to make it a stale claim, no presumption of payment arises. *Id.*

STATUTE OF NON-CLAIM. See *Administrators and Executors*, 13, 14, 16; *Statute of Limitations*, 3, 10, 11, 12.

SUPERINTENDENT OF PUBLIC SCHOOLS. See *Schools*, 7, 8.

SUPERSEDEAS. See *Appeals*, 11.
such warrant passes no title. *Donald* vs. *McKinnon*, 746.

SUPPLEMENTAL BILL. See *Pleading* (*Equity*), 5; *Practice* (*Equity*), 6.

SUPREME COURTS AND JUDGES. See *"Courts and Judges."*

TAXATION AND TAXES. See *Attorneys at Law*, 2; *Principal and Surety*, 2, 3, 4; *Schools*, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10; *Trusts and Trustees*, 2.
In the absence of a warrant being annexed to the assessment roll delivered to the Collector of revenue as required by law, he cannot proceed to enforce the payment of taxes and a sale made without

TENANTS IN COMMON. See *Criminal Law*, 9; *Ejectment*, 1, 2; *Ships and Shipping*, 3, 4, 5, 6.

TENDER. See *Mortgage*, 2, 5; *Vendor and Purchaser*, 3.

TITLE. See *Administrators and Executors*, 5; *Courts and Judges*, (*Probate,*) 2; *Forcible Entry and Unlawful Detainer; Vendor and Purchaser.*

TRANSFER OF CAUSES. See *"Change of Venue."*

TRESPASS—
ACTION OF. See *Pleading*, (*Law,*) 6.
ON LANDS. See *Pleading*, (*Law,*) 5, 6.

TRIALS. See *Change of Venue*, 4; *Verdict.*

TRUSTS AND TRUSTEES. See *Administrators and Executors*, 12; *Guardian and Ward*, 2; *Mortgage*, 1, 3, 6, 8, 9, 10; *Practice*, (*Equity,*) 3; *Vendor and Purchaser*, 6, 7; *Wills*, 1.

1. A party having the right to enter into possession of land, and agreeing

STATUTES CONSTRUED AND REFERRED TO—(*Continued.*)

LIMITATIONS.
Thompson's Digest, 490, (A. D. 1832.)
Nelson vs. *State*, 195.

PLEADING. See *Sub-title Indictment.*

POLYGAMY.
Chapter 1637; Sub-Chapter 8, Section 4, 5.
Gallaher vs. *State*, 370.

PRINCIPALS IN THE SECOND DEGREE.
Chapter 1637, (A. D. 1868); Sub-Chapter 11, Section 3.
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DIVORCE.
Thompson's Digest, 223, (A. D. 1835.)
Crawford vs. *Crawford*, 180.

DOWER.

Thompson's Digest, (A. D. 1828,) 184-5.
McMahon vs. *Russell*, 698.

ELECTIONS AND ELECTION RETURNS.

Chapter 1625, (approved August 6, 1868); Chapter 1868, (approved February 27, 1872); Chapter 3021, (approved February 27, 1877.)
State, ex rel., vs. *Board of County Canvassers*, 9.
State, ex rel., vs. *Board of State Canvassers*, 29.
State, ex rel., vs. *Commissioners of Jefferson County*, 707.
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Books of account admissible in: chapter 662, (approved 1854.)
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Raulerson vs. *Rockner's Administratrix*, 809.
Sanderson's Administrators vs. *Sanderson*, 820.

TRUSTS AND TRUSTEES—(*Continued.*)
the principal and interest due from the trustee is first ascertained and from this the principal and interest of the note is deducted. The balance is the amount due. *Id.*

9. A paper in the form of a mortgage which in terms conveys real estate to secure a debt, the mortgagor having no legal title but only a right to the rents and profits for life, creates no lien upon the realty, but is good as an assignment or pledge of the rents and profits. *Wilson* vs. *Russ and Merritt*, 691.

10. A trustee holding the legal title of land is a necessary party in a proceeding affecting the property or any interest therein; but when there is no trustee in being, at the commencement of suit, and a decree does not affect the title or the interest of a remainderman, the decree reaching only the net income of the property, a trustee may be appointed by the final decree, with proper directions as to the management of the property and the payment of the income. *Id.*

11. If a trustee so appointed refuse the trust, a receiver may be appointed to protect the interests of all parties interested in the estate. *Id.*

VENDOR'S LIEN. See *Vendor and Purchaser*, 1, 6.

VENDOR AND PURCHASER. See *Pleading*, (*Equity*,) 6, 7; *Trust*, 1.

1. A vendor of land has not by virtue of his lien for unpaid purchase-money a lien upon the rents and profits. The equitable right of a mortgagee to charge upon the rents and profits depends upon the peculiar circumstances of the case. Such equitable charge is subordinate to any lawful lien upon the products existing at the time they are sought to be charged. *Wooten* vs. *Bellinger*, 289.

2. It is not necessary that the vendor should have a complete, unincumbered title at the time he contracts. It will be sufficient if he will make a good title at the time he agree to convey. The general allegation in a plea that vendor has not a good title is not sufficient. Vendee must state facts showing exactly where the deficiency is. It is the province of the court to determine what constitutes a good title, and to present the question, the facts urged in denial of its existence must be stated by the pleader. *Sanford* vs. *Cloud*, 532.

3. Covenants that upon the faithful performance by vendee of the covenants and agreements to be by him performed, and upon the payment of the several sums of money mentioned, and the interest thereon at the times and in the manner and at the place mentioned to the vendor, *that thereupon* the vendor will well and faithfully execute and deliver a good and sufficient deed, and thereby convey a good fee simple title, are dependent covenants. After the expiration of the time for the payment of the last installment and the performance of the

VENDOR AND PURCHASER—(*Continued.*)
last act, the vendee, to have his action for an entire breach, must execute and tender a conveyance in conformity to his contract, and the declaration in the suit must aver such tender. An averment of readiness and willingness to convey is not sufficient. *Id.*

4. In an action by vendee against vendor upon an executory contract for the sale of land, the general rule is that the measure of damages is the purchase-money and interest and expense of investigating title. This rule, however, does not apply where there is want of good faith in the vendor shown by his voluntarily conveying the land to another, or by any other act inconsistent with the utmost good faith. In such cases, or in cases where vendor had no title, although he acted in good faith, he is liable for the value of the land at the time of the breach, with interest from that date. *Id.*

5. A party in possession of land, seeking to set aside a contract of purchase of such land which he made with another person, as a cloud upon his title otherwise acquired, must clearly establish his own title before he can have such relief. Equitable relief of this character is granted only in cases of clear title in the plaintiff. *Sanford* vs. *Cloud*, 557.

6. Where, in a bill filed to enforce an equitable lien upon land, a third person as defendant claims to be a purchaser in possession, and that he has made valuable improvements upon the land, and does not positively deny that he had notice as charged in the bill of the equities of the complainant, and does not show that he has entered into a valid agreement to purchase, nor paid any part of the purchase-money nor what improvements have been made by him on the premises, or their value, such claimant has no standing as a *bona fide* purchaser without notice. *Porter, et al.*, vs. *Teate*, 813.

7. Knowledge on the part of a vendee that another is in possession of land, he (the vendee) believing that she in possession is a tenant, coupled with notice (constructive by its record) of the contents of an instrument relating to the land, but not possessing the legal title to his grantor, in which, by a description of the topography of the land, he would be led to inquire as to the claim and interest of the party in possession, is sufficient information to lead the vendee to a knowledge of the nature of the title and claim of the party in possession, and a court of equity will deem him conusant of it. *McRae et al.*, vs. *McMinn*, 876.

VERDICT. See *Criminal Law*, 22, 27, 28.

Parties consenting that two actions of the same character between the same parties with like defences shall be submitted to the same jury for trial at the same time, having made no objection to the rendi-

VERDICT—(*Continued.*)
tion of one verdict at the time, will not be heard to object thereafter. *Raulerson* vs. *Rockner's Administratrix*, 809.

VENUE. See *Change of Venue.*

WAIVER. See *Appeals*, 18, 20, 21; *Evidence and Witnesses*, 5; *Judgment*, 13; *Pleading*, (*Law*,) 19; (*Equity*,) 5; *Practice*, (*Equity*,) 6; *Verdict.*

WIDOW. See *Child's Part; Dower.*

WILLS.

1. An estate vested under a will in A., as trustee for B., so long as B. shall live with C. upon the homestead place of the testator, B. and C. living upon the place anterior to and at the death of the testator, presents the case of a testamentary disposition of property, upon condition subsequent. *Jenkins* vs. *Merritt, et ux.*, 304.

2. When there is no ambiguity in the terms of a will, no doubt or uncertainty as to subject-matter or persons upon which it is to act, no technical words whose strict legal signification must be varied to conform to the intent of the testator, and no doubt arising from a consideration of the whole will, parol evidence of collateral facts and circumstances is inadmissible. Upon the happening of a state of facts not contemplated and provided for by the testator, courts are not authorized to imagine what would have been the desire of the testator under such circumstances and to enforce such presumed desire as a part of his will. *Id.*

3. Conditions in restraint of marriage not being favored, equity will not decree a forfeiture of an estate by implying a condition of celibacy from a simple requirement of co-residence of two females, both of whom are unmarried at the death of the testator, one of the females being a niece of the wife of the testator, the other being a daughter of the testator of weak mind and imprudent habits, accustomed to receive care and attention at the hands of the niece. *Id.*

4. Conditions which destroy an estate are taken strictly, and although a forfeiture must be enforced when clearly established, it should not prevail upon doubtful testimony. *Id.*

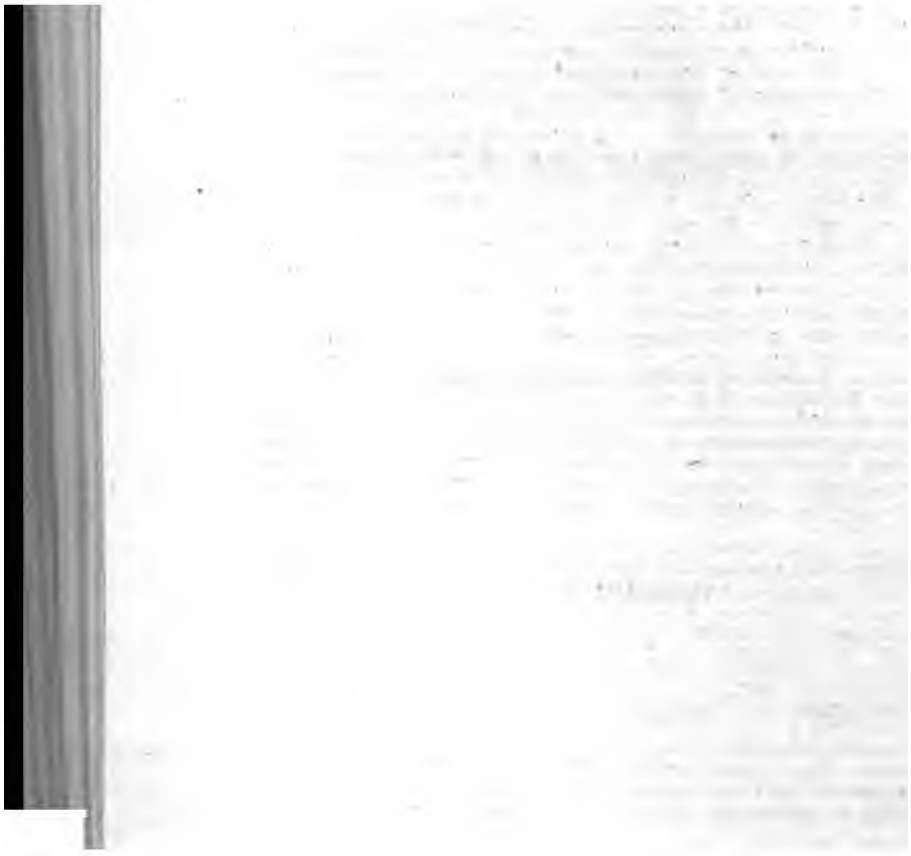
WITHDRAWAL OF PAPERS. See *Practice*, (*in Supreme Court.*)

WITNESSES. See *Evidence and Witnesses.*

WRIT OF ERROR. See *Appeals*, 2.

The State is not required to give bond when she prosecutes a writ of error. The statutes authorizing the payment of the costs by the Treasurer upon the warrant of the Comptroller regulate the liability of the State in this respect. *State* vs. *Rushing*, 223.

"WRITINGS WHEREBY MONEY IS PROMISED OR SECURED TO BE PAID." See *Contracts.*



CASES ARGUED AND ADJUDGED

IN THE

Supreme Court of Florida,

DURING THE YEARS 1878-9-80.

REPORTED BY
GEO. P. RANEY, Attorney-General

VOLUME XVII.

TALLAHASSEE:
PRINTED AT THE FLORIDIAN BOOK AND JOB OFFICE
1880

UDGES OF THE SUPR COURT

DURIN[G] THE TIME OF THESE REPORTS.

HON. EDWIN M. RANDALL, Chief Justice.
HON. JAMES D. WESTCOTT, JR., } Associate Justices.
HON. R. B. VAN VALKENBURGH, }

ATTORNEY-GENERAL.

GEORGE P. RANEY.

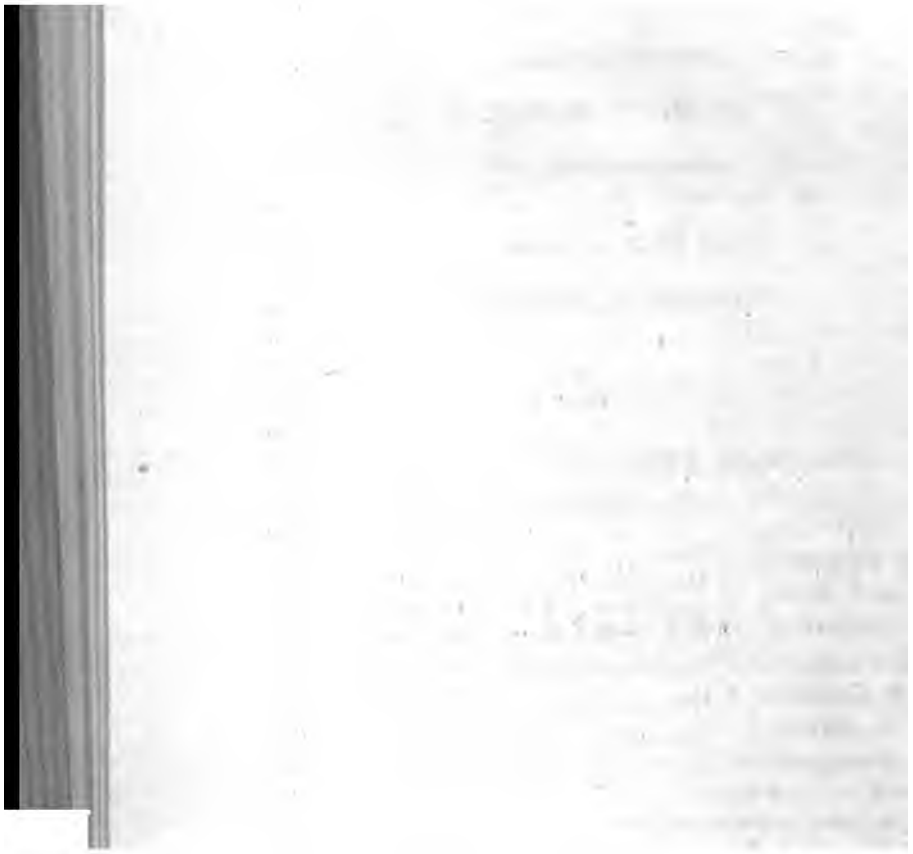
CLERK SUPREME COURT.

CHARLES H. FOSTER.

JUDGES OF THE CIRCUIT COURTS.

FIRST CIRCUIT—	HON. AUGUSTUS E. MAXWELL.*
SECOND CIRCUIT—	HON. P. WOODSON WHITE.†
	HON. DAVID S. WALKER.‡
THIRD CIRCUIT—	HON. WILLIAM BRYSON.
	HON. ENOCH J. VANN.§
FOURTH CIRCUIT—	HON. ROBERT B. ARCHIBALD.
FIFTH CIRCUIT—	HON. JAMES B. DAWKINS.
SIXTH CIRCUIT—	HON. H. L. MITCHELL.
SEVENTH CIRCUIT—	HON. WM. ARCHER COCKE.

**Ad interim* appointment expired and appointed for full term February 6, 1879. †*Ad interim* term expired. ‡Appointed February 1, 1879. ¶Term expired. §Appointed January 17, 1879.



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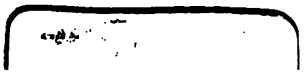
NOTE—The head notes in each case were prepared by the Judge who delivered the opinion.